CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JUNE TERM, 1817.

East'n District. *June* 1817.

BAYON
vs.
TRICOU & AL.

BAYON vs. *TRICOU & AL.*

APPEAL from the court of the second district.

This case turns upon a mere question of fact.

DERBIGNY, J. delivered the opinion of the court. The defendants sold to the plaintiff and appellant, some time ago, a plantation and negroes, on which the latter made some improvements. During the time he remained in possession he made several payments, and at times had recourse to them for aid in the payment of part of these improvements. Reciprocal accounts ensued between the parties, for the settlement of which the plaintiff and appellant instituted the present suit. By this time, the present defend-

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ants and appellee had instituted a suit for the rescission of the sale. In that state of things the parties entered into a compromise, by which it was agreed to put an end to both suits; and, by consent, a judgment was entered, by which the sale was rescinded, and a sum of money, and a few slaves, adjudged to the present plaintiff and appellant, in full of all demands.

The items claimed from the appellees in the present suit bear date during the time he possessed the plantation, and are evidently part of the funds which were laid out on the plantation, or on its account; and even if all of them were not of that nature, they could not but be considered as included in the settlement which has taken place: a settlement which, to this court, appears to have contained all the respective claims of the parties, and by the result whereof the plaintiff and appellant has been paid by the appellees a balance in full of all demands.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Davesac for the plaintiff, *Morel* for the defendants.

He who contracts to import goods for another, must strictly comply with the orders he receives.

RALSTON vs. *PAMAR.*

APPEAL from the court of the parish and city of New-Orleans.

This was an action for goods, wares and merchandize sold and delivered by the plaintiff to the defendant, and the general issue was pleaded.

There was judgment for the defendant, and the plaintiff appealed.

By the statement of facts, it was admitted that the defendant received the property, which the bill of lading, annexed to the record, calls for, entered the same and secured the duties—that on opening the crates he called a survey and procured the report annexed to the record—that one witness, (Harrison) declared it was almost impossible to cause an order to be executed, so as to comply in all respects with the wishes of the purchaser—that the prices and qualities would frequently vary a little—that the goods were not unsold, and in the state in which they were received.

It was agreed that the documents accompanying the record, should be read in the supreme court.

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These were a protest made by the defendant before a notary public, and the report of gentlemen called upon to view the goods.

The notary, in his protest, stated that, having called upon the plaintiff, he declared to him that certain goods, wares and merchandize, which he had caused to be shipped from Liverpool, in Great-Britain, in the ship Eliza, by order and for the account of the defendant, were not conformable to said order, being of much higher prices; and yet the quality of the goods of a very inferior degree, the price considered; and that the defendant had, as is customary, given bond for the said duties at the custom-house, and required the plaintiff to take back the said goods and merchandize, and to pay, or give counter sureties for the payment of the bonds signed by the defendant for the duties thereof, for and because the said goods, in their quality and price, were not what the defendant had ordered him to cause to be shipped: and also, that, as the defendant was willing to do, in this business, all that a reasonable dealer could do, upon the loss and inconveniences resulting from the premises, he was willing the whole affair should be left to the arbitration of two discreet merchants of the city, to be chosen, one by the plaintiff and the other by the defendant, and to be whose

governed by their decision and award. To which the plaintiff answered, he had forwarded the order given him by the defendant, as he received it, and if it had not been executed, he was not to be blamed, nor would he have any thing to do or say further in the business.

By the report of the merchants, called by the defendant to view the goods, it appeared that they were of much higher prices than those ordered.

Mathews, J. delivered the opinion of the court. From the documents, accompanying the statement of facts, agreed upon by the parties, it appears that the plaintiff claims the value of certain china and glass ware, procured and purchased by him for the appellee, at the request and in pursuance of orders, given by the latter, which were not punctually executed. On account of the variance between the articles ordered by the appellee, and those procured and sent to him, both as to the things and their prices, he protested against receiving them on his own account, and refused to pay for them.

It is true he had them in possession, so far as was necessary for the purpose of entering them at the custom-house, and securing the duties. But, this act, as the goods were to be landed,

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being equally beneficial to all who might be interested in the property, ought not to be prejudicial to him. It cannot alter the nature of the contract between the appellant and appellee. The former, as factor, or attorney, could not bind the latter to the extent of the authority given, which, if not exactly attended to, would free him from every obligation arising out of the agreement.

The evidence shews, that the orders of the principal were not executed by the agent, as they ought to have been.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be affirmed with costs.

Duncan for the plaintiff, *Grymes* for the defendant.

FOSTER & AL. vs. *DUPRE.*

Interest cannot be allowed by the court on an unliquidated claim.

APPEAL from the court of the first district.

The petition contained two counts: the first for money laid out and expended by the plaintiffs for the use of the defendant, the other for [illegible]

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An action for money laid out and expended, or for money had & received, cannot lie against a wrong-doer by the party injured, to recover his consequent disbursements, on an implied promise of the defendant.

paid and received by the latter from the former. Reference was had in the petition to an account annexed thereto, composed of several items, for lawyers, marshal, clerk and notary's fees, with the expenses of an express to Washington, amounting together to $1599 75: to which was added the sum of $896, for eight years interest. The charges appeared to have been incurred in defending the plaintiffs' ship, in a suit brought by the United States, for the breach of an act of congress, by the defendant, in putting several negroes on board. The defendant pleaded the general issue.

The district court gave judgment in favor of the plaintiffs for $2495 75, the sum claimed, with interest from the date of the petition, being of opinion, that "from the manner, time and place of putting the negroes on board, both the captain and shipper knew it to be contrary to law, and having combined in the transaction, they were both bound to make good the losses resulting from it."

The defendant appealed.

The statement of facts is subscribed by the counsel of each of the parties. It relates, that

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the plaintiffs, in the year 1809, were ow... the ship Clara, which sailed from the po... New-York, on the 8th of January of that ye... A. Tanal, master, bound for New-Orlea... board of which the defendant was a passen... When the ship had proceeded as far dow... Governor's Island, or perhaps a little below... boat came along side, from which two negro... men, the property of the defendant, were ta... ceived on board. The negro women were i... mediately put under the hatches, and there k... tained till the ship got to sea, when they w... released and permitted to come upon de... When the ship arrived at the mouth of the Mi... sissippi, they were again put under the hatch... until they were landed. At or after the arri... of the ship in New-Orleans, the consignees d... not see the negro women on board. Inform... tion was lodged with the collector, that th... had been brought on board of the ship, and t... was seized and libelled in the district court ... the United States, and condemned as forfeit... to the United States. The plaintiffs spent ... defending the suit $1449 75, and $150 in sen... ing an express to the city of Washington, t... obtain a remission of the forfeiture, as stated ... the account annexed to the petition. The ca... tain received the freight of said negroes o...

passage of the defendant; and about the the ship was seized, several others were for the same cause, having come to New-Orleans from Baltimore and Charleston.

Clark for the plaintiffs. There cannot be any doubt of the plaintiffs' right of recovery on the merits. As to the form of the action, that of assumpsit has been resorted to, because it is, in its nature, always an equitable one. It is a general description of all the cases in which it lies, that the defendant is bound by ties of natural justice and equity, to reimburse monies which have been paid for his benefit. Indeed, it is considered in the books as a *generic* action, applying to almost every possible description of cases, resulting from the dealings and transactions of men, in this age of commerce; *comprehensive* in its meaning, *efficacious* in its remedy. It has its origin in contracts, either express or implied, for the purpose of affording a remedy, whenever an injury has been received, either through mistake, deceit, misrepresentation, imposition or oppression. Courts of justice will lend a ready ear to the suggestion of an implied promise.

Assumpsit lies to recover back money paid under a mistake, or through the fraud of the party. *Bexe* vs. *Dickson*, 1 *T. R.* 284, *Hussar*

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vs. *Wallis*, 1 *Salk.* 23. To recover money on a consideration which happens to fail. 2 *Burr.* 1012, 1 *T. R.* 732, 3 *id.* 365, *Shelton* vs. *Rastal*. To recover money paid to any person acting under a void authority, *Robertson* vs. *Eaton*, 1 *T. R.* 59, *Jacob* vs. *Allen*, 1 *Salk.* 26. *Allen* vs. *Dundas*, 3 *T. R.* 125, or money obtained by fraud, extortion, imposition, oppression, or taking an undue advantage of the situation of another. 1 *Burr.* 1012, *Artly* vs. *Reynolds*, 2 *Strange* 915, *Smith* vs. *Brownley*, *Douglas* 696, *Crockehst* vs. *Bennet & al.* 2 *T. R.* 763—money that has been embezzled, or which any person has been defrauded of by cheating, or otherwise. *Whip* vs. *Thomas*, *Buller's N. P.* 130.

Injuries received from any circumstance, originating in *mala fide*, the general current of authorities say may be reached by the *action for money had received*. *Clark* vs. *Shee & al. Cowp.* 197. *Trelhane* vs. *Terry*, *Bull. N. P.* 131, *Moses* vs. *M'Farlane*, 2 *Burr.* 1005. 2 *Black. rep.* 219, *Jaques* vs. *Goulingsly*, 2 *Black.* 1073, *Jacques* vs. *Wethy*, *H. Bl.* 65 *Browning* vs. *Thomas*, *Cowp.* 79.

As a general rule, I may say that *indebitatus assumpsit* will lie in every case, when the law or the circumstances of the case give a claim to the plaintiff.

Porter for the defendant. The plaintiffs must fail, for the evidence, which they have introduced, does not support the facts alleged in the petition. There is no evidence of any promise on the part of the defendant, who therefore has only to answer *non in hæc fœdera veni*.

Besides, the plaintiffs cannot complain that the defendant put on board of their ship, slaves, which they, through the master of her, willingly received.

Finally, the judgment must be reversed, at least for the interest which has been allowed before the beginning of the suit: for there was no demand, and the claim was unliquidated.

Martin, J. delivered the opinion of the court. The judgment of the district court is certainly erroneous in the allowance of the sum of 896 dollars, for interest during eight years, preceding the inception of the suit. There is not any stipulation for conventional interest: the sum claimed is an unliquidated one. We are at a loss to see on what ground any interest was allowed for any period antecedent to the suit: no other demand of the money claimed appearing to have been made. For this reason, the judgment must be, and is annulled, avoided and reversed.

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Proceeding to inquire what judgment the district court ought to have given, we find the action brought on an illegal contract, and we seek in vain for any agreement, to which the defendant gave any express or implied assent.

The facts are, that the defendant came on board as passenger in the plaintiffs' ship from New-York—that in the Narrows a boat approached the ship, and put aboard two slaves, the defendant's property, who were concealed under the hatches, so long as the ship was within the reach of officers of the customs, both in New-York and in the Mississippi—that the ship was seized on account of these slaves, and that the plaintiffs incurred the expenses, stated in their account, in order to procure her to be restored.

The case is that of a tort or injury, from which may result an obligation to pay damages: but, the plaintiffs have chosen to turn it into a promise to pay certain costs, which they have incurred, and which they allege were paid at the request of the defendant. If he promised to pay these costs, an action certainly lies on his promise. If they were paid for him, and at his request, an action equally lies on the promise, which the law raises. In neither case will he with success, contend that he committed no tortious act.

The plaintiffs' counsel has cited a number of authorities from English books, tending to shew the extension given to the action for money had and received. But they are all cases of money received by the defendant. Neither in Great-Britain, the United States, nor in any country in which the distinction between actions grounded on contracts is known, was it ever successfully alleged that the commission of a tortious act is evidence of a promise to repair the injury done, by yielding damages.

The plaintiffs, by the nature of their action, have alleged a promise as the basis of their claim.

The defendant has put this promise in issue.—There is not any evidence of an express promise, and the law does not warrant us in declaring that there is an implied one. It is true, a tort is set forth in evidence, but as the nature of the pleadings did not authorise the defendant to defend himself against this charge—as the promise, if really made, admitted it, or waved the right of offering any thing in opposition to the charge, we cannot consider the question how far the plaintiffs have a right to indemnification.

It is therefore ordered, adjudged and decreed, that judgment be entered for the defendant, with

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costs of suit in both courts, without any prejudice to the plaintiffs' claim for damages, if any they have.

ST. GEM vs. WEEMPENMOER.

Acts of the legislature are not in force immediately after they receive the governor's signature, but after promulgation.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff moved the court of the first district to dissolve an injunction, which the defendant, without giving any security had obtained on the 12th of February last. He showed that, on the same day, there was lodged, by order of the governor, in the office of the clerk of that court, the copy of a law, approved the 30th of January, which inhibits the grant of an injunction, without taking security.

The defendant resisted the dissolution, shewing that the injunction could well be granted, without taking surety, as acts of the legislature are not in force in the parish of Orleans, in which the court of the first district sits, till three days after their promulgation.

The court below overruled the objection, considering that "acts of the legislature are in force, in the parish of Orleans, three days after the approbation of the governor, and, in the other

parishes, a certain number of days, according to the distance, is allowed, before the law is considered as promulgated in each of them. This seems to be the only act of the governor in promulgating the laws. The act of transmitting copies of them to the different authorities is not a promulgation of them to the people: but merely that the authorities may have the earliest possible information of what the laws are, and this is not the act of the governor."

To this opinion the defendant excepted and the present appeal is taken on the bill of exceptions.

Before the civil code, the precise time, on which the laws of the state were to begin to have effect, not being determined by any positive law, it was holden that their effect began as soon as they had received the governor's signature. The code tells us, that as the laws cannot be obligatory without being known, they shall be promulgated by the governor. *Civil Code 2, art. 4.*

The promulgation here spoken of is a means of making the laws known—the subscription of the governor's name to an act goes but a very little way towards making it known. Its object is to sanction it, and it would be vain to order, as an act of promulgation, one which was indispensable to the confection of the law. The con-

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clusion is forcibly impressed on the mind, that as the governor is directed to promulgate, and the law cannot be obligatory without being known, the promulgation must be a means of making public what has been sanctioned as a law—it would have been absurd to have said, as the laws cannot be obligatory without being known, the governor shall sign them, when the ordinance of 1787, the then constitution of the country, required this very signature, for the existence of the law.

After directing the promulgation, we are to expect that the code should inform us of the mode of promulgating; and in the same article, immediately after the injunction to promulgate, we find it said that the laws shall be directed to the authorities, in the form and manner which is or may be prescribed, to insure their utmost publicity. This was to be effected by sending manuscript or printed copies to the officers, or by publication through the news papers—in neither case is the governor's personal agency absolutely required. He may direct the sending or publishing the copies, and the code imposes no other obligation but that of seeing it done. If the legislature appointed a printer and made it his duty to print and send copies, or directed any officer to transmit the laws, the governor is

still bound to see the injunction obeyed. If, without his act, the laws be promulgated and become known, the execution is not to take place till the directions of the code be complied with, though without any interference on his part.

To interpret the code, so as to render the signature of the governor a sufficient promulgation would be to adopt the cursed exposition which corrodes the viscera of the text.

With regard to the law alluded to in the bill of exceptions, we notice, annexed to the copy sent by the governor, a resolution of the legislature, bearing date of the 1st. of February, when three full days had passed since the law was signed by the governor, (and when, according to the construction of the district court, it was not only promulgated but already in full force in the parish) requesting him to have printed in the shortest possible delay 150 copies of it, and to promulgate the same by forwarding immediately to each of the clerks a copy of said law.

We therefore conclude that the district court erred, in considering the law as in force in the parish of Orleans, three days after the governor's approval of it, and as there is no evidence before us of any other promulgation, than the transmission of the copy, to the clerk of the

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court on the 12th of February, eleven days after the resolution ordering the printing, we conclude there was no promulgation before that day. As it is not alleged, we cannot presume that the promulgation was made on that day, before the grant of the injunction, in which case, it would be proper to consider whether, as the code requires that the laws should be executed through every part of the territory from the moment the promulgation shall be known, and declares that the promulgation shall be supposed to be known three days after, &c.—the law would not be in immediate operation at the time of granting the injunction, if a copy was before that time in the possession of the court.

It is ordered, adjudged and decreed, that the order of the district court dissolving the injunction, be annulled, avoided and reversed, and that the court be directed to reinstate it and grant a new writ of injunction, if needed, and proceed in the cause as if the injunction had not been dissolved, and it is further ordered that the plaintiff and appellee pay costs in this court.

Desbois for the plaintiff, *Duncan* for the defendant.

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A judgment of discontinuance cannot be pleaded in bar to another suit brought for the same cause of action.

APPEAL from the court of the parish and city of New-Orleans.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellee instituted this suit for the recovery of a negro woman and child.

The defendant pleaded in abatement, in bar, and the general issue. In abatement another suit pending between the parties for the same cause of action: in bar, a final judgment in his favour in a former action, and title by prescription.

The only evidence offered in support of these pleas is the record of a suit heretofore instituted, between the same parties, and for the same cause of action. It is clear that this evidence does not support all the pleas, and it is believed that it is not sufficient to support any one of them.

The former action could not be finally adjudged, and still pending at the time that the defendant filed his answer in the present, and although it does not clearly appear from the record of the present suit, that the judgment of discontinuance pronounced in the other, was already given at

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the time of filing the answer, yet as the first suit is pleaded as *res judicata*, and as the time allowed to the defendant to answer, after he was cited comes down to a date later than that on which the judgment of discountenance seems to have been pronounced, we assume it as a fact that the judgment was prior to the answer and consequently the plea in abatement is not well sustained.

The record of the former suit shews that, after the trial had been proceeded in, so far as to examine several witnesses, the plaintiff moved the court for leave to discontinue, and a judgment of discontinuance was accordingly entered, the effect of which it now becomes necessary to examine.

It is a general rule of proceeding, in courts of justice, that a plaintiff may discontinue his suit at any time before entering on the trial of it. Such a discontinuance subjects him to the payment of costs, but does not hinder him from supporting a new suit for the same cause of action. We are of opinion that it comes within the legal discretion of a court, before which a suit is pending, to permit the plaintiff to discontinue even after entering on the trial: and there cannot be any doubt of the effect of the discontinuance being the same in both instances — leaving to the

ty the right of renewing his suit. If we are correct in laying down these rules the plaintiff and appellee is not bound by the judgment of dismissance.

The defendant and appellant claims title to the slaves, who are the subject of this suit by prescription. Without entering into an examination of the various periods and different durations of time, necessary to create a title to property, according to our laws of prescription, it suffices, in the present case to observe that there is no evidence which fully supports the defendant's claim, under a prescription of twenty years, on which he seems to rely.

In relation to the original title, as contested between the parties, it is true that a contrariety of testimony is exhibited. By witnesses on different sides, facts directly opposite are sworn to. Here is evidently false swearing, it is hoped, though mistake. This court is not in possession of any better means of ascertaining the truth, by weighing the testimony, than those which were in the power of the parish court. It is thought that the conclusions, as to the facts then made, are as correct as any that could be now formed.

Thus far, we discover nothing erroneous in the judgment of the inferior court. But in

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awarding damages to the plaintiff, for the detention of the slaves, it is believed that the court erred. They were sequestered ever since the commencement of the suit. In all probability they have been saved to the plaintiff by the act of the defendant, in bringing the mother from St. Domingo, when the fortune of all the inhabitants of that place had been destroyed by the revolution. The defendant had a right to hold them in possession, without being answerable in damages, till the title of the plaintiff should be fully established by a competent tribunal. It appears also, from the contrariety of the testimony, that he held the slaves in good faith, believing them to be his own property.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed: and, proceeding to give here such a judgment as in our opinion the justice of the case requires, it is further ordered, adjudged and decreed, that the plaintiff do recover from the defendant the negro woman sued for, and her children, with costs in the parish court, and that he pay the costs of the appeal.

Morel for the plaintiff, *Livingston* for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1817.

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RAMSEY vs. STEVENSON.

RAMSEY vs. STEVENSON.

APPEAL from the court of the first district.

If a debtor assigns all his estate to trustees, for the benefit of his creditors, any part of it may be attached before they obtain the possession of it.

On the 3d of October, 1816, Stevenson, being in embarrassed circumstances, assigned over all his estate to M'Culloch and Holmes, his trustees, for the benefit of all his creditors. The parties are all citizens and residents of the state of Maryland, where the assignment was executed. This instrument is made according to the forms in use in that state, mentioning particularly a large amount of property, worth, probably, half a million of dollars, and, generally, all the estate, real and personal, of the assignor.

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After this assignment had been made, Ramsey, one of the creditors, sent here, and attached goods belonging to the estate, to the amount of his debt, (which is admitted to be due) in the hands of the garnishee.

The assignees in the district court below, interposed their claim, as possessed of the property under the assignment, and pleaded it in bar of this attachment; but the court declared the assignment void—that it did not vest the property assigned in the assignee, and gave judgment for the attaching creditor.

From this decision, the present plaintiff appealed to this court.

Stannard, for the assignees. There are two principal points to be decided. We contend

1. That the assignment of Stevenson, of all his estate, to the assignees, vested in them the right which he had in the property assigned.

2. Supposing the assignment to have had that effect, the property ought to be restored to the assignees, notwithstanding the proceedings in the court below.

I. It is a clear proposition, that every man has a right to dispose of his property as he pleases. Exceptions to this rule are admitted

to exist—they will be all noticed. The question is, whether or not the property in New-Orleans passed by the assignment—and that it does so pass, cannot be doubted, unless there were some positive law of this state to prohibit it—we know of no such impolitic law, and believe it cannot be found in the statute book. If there is such a law, let it be produced. Will it be contended that this assignment is not good by the laws of Maryland? Such an argument must completely fail—the citizens of that state, by its constitution and bill of rights, are governed by the English common law. The proceedings of their courts are according to the course of the common law. It is unnecessary to inquire whether the general system of those laws be wise or not. The court do not require to be informed of this—we will not attempt to give information on this subject—but we do call on the counsel to say, whether any statute of Maryland forbids the assignment. If they cannot do this, the court will presume that what has been done, has been done correctly; since, as to this particular, nothing to the contrary is shown. Now, as all the parties are citizens of Maryland, they are bound by its laws. This rule will not be controverted. Then the true question is, what would the courts of that state

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say of this assignment? If the conveyance is in compliance with the laws of a sister state, and all the parties are citizens of the place where the assignment was made, will this court interfere, and in effect declare those laws a nullity? This would go but a little way to preserve the independence of states and the harmony of their laws. Is there not a certain respect due from one country to another, which has ever induced courts to recognize the laws and the rights of citizens and subjects, even of a foreign country? The reason of the law is much stronger with citizens all of the same republic. This too is a necessary comity, a necessary courtesy, observed in every court. It is not a matter of speculation—it is not theory alone—it is a practical principle, and grounded on the laws of nations—and it is on wise principles, that foreign states acknowledge and act according to the different civil relations which subsist between men in their own country. 2 *Hen. Black.* 409. It is unnecessary to cite jurists on this subject. The most industrious research might be defied to produce an authority to the contrary. The practice prevails in every government. What was said by Lord Loughborough, in the case of *Sill* vs. *Warswick*, *Hen. Black.* 690—1, which was a proceeding very similar to the pre-

sent, is peculiarly applicable. "If the bankrupt happens to have property which lies out of the jurisdiction of the laws of England, if the country in which it lies, proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the courts of this country [England] have been uniform to admit the title of assignees." We believe this court has never been censured for a want of due respect to the laws of a sister state: on the contrary, the most liberal views have guided its decisions. In this case there is not—there cannot be—any imputation of fraud.

But we are now to investigate the question, how far this assignment operates? To make the way as clear as possible for the decision of this court, let us see whether this actual or voluntary assignment does not vest the property in the assignees, to the same extent as an assignment would do under insolvent or bankrupt laws? We make this inquiry as, if the effect is the same, the cases heretofore decided upon both species of assignments, may be safely relied on, because analogous to the laws of the state of Maryland. A voluntary assignment, and an assignment under laws, are frequently spoken of in the books (when the subject of property

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in the assignees is agitated) as synonymous—and there are many decisions to this point. Thus, in the case of *Cleve* vs. *Mills*, *Cooke's Bank. Laws*, 370, *last edit.* Lord Mansfield decided that "assignments under commissions of bankruptcy, are considered as voluntary assignments." So in another case, *id.* 372, that same judge decided, that a debt might be recovered in England, due to a bankrupt in a foreign country, where the law obtains analogous to the English bankrupt laws, which other countries will take notice of, and consider in the same light as if the bankrupt law made an actual assignment." By 'actual assignment, his Lordship must undoubtedly have meant, a voluntary assignment, agreeably to his own, and other opinions, expressed in former cases. The same decision was also made so long ago as the case of *Captain Wilson*, *id.* 373, decided by Lord Hardwick, in 1752—6. And, with a view to the same principle, Lord Kenyon, in delivering the opinion of the court, in *Hunter* vs. *Potts*, *Term rep.* 193, which involved an inquiry into the effect of an assignment, in a foreign country, made under the British bankrupt laws, proceeds to state the question to be, "whether or not the property passed by the assignment in the same manner as if the bankrupt had assigned it by

his voluntary deed." And here it may be proper to notice particularly the opinion of the court of king's bench, in the case just cited. The decision went upon the ground, that an assignment under the bankrupt laws, and an assignment voluntarily made, *i. e.* without the coercion of the law, were the same. Erroneous opinions have been entertained with respect to the true meaning of the word "voluntary." It has been contended, that this word, (frequently used in the books) means without a valuable consideration; but it is impossible to consider it in that light—when Lord Kenyon says, that it means a voluntary act, as contradistinguished from a compulsory act by law. Now, it is impossible for the gentleman on the other side to shew that the assignment of Stevenson, as respects the property assigned, operates in England, in the state of Maryland, and, with respect to citizens of that state, in this state, differently: the effect is the same.

If what has already been said be correct, there is nothing now to embarrass an investigation of the truth of the first proposition.

It is material to observe, that this controversy relates to *personal* property. It is assumed as a correct position, that by the law of na-

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tions, (and it is not known that the municipal laws of any country forbid the principle) *personal* property is subject to that law which governs the *person* of the owner, *Vattel, b. 2. c. 7. s. 85. c. 8. s. 109-10.* The *Lex Domicilii* always prevails, *Huberns, 3 Dall. Rep. 370, note,* thus states the rule in his *third maxim.* "By the courtesy of nations, whatever laws are carried into execution within the limits of any government, are considered as having the same effect every where," and in the case of *Sill* vs. *Warswick*, the court says, "It is a clear proposition, not only of the law of *England*, but of every country in the world, where law has the semblance of science"—and the court will not at this late day, overturn an ancient and well settled principle of jurisprudence. What then can be more evident, than that the assignment having been executed according to the laws of the place which govern the property and persons of the assignor, assignees, and the attaching creditor, this court will give the same effect to it, as would be given in the place where it was executed? If this court were left to make a rule upon the subject, would a different one be established? We think not. There is much good sense and justice in the principle—it gives to every man his right—Every one is

supposed to know the laws of his own government, but who is bound to know the laws of another? No one, unless he resides and trades there. It has been before observed that the British and Maryland laws are analogous.—Let us advert to the cases of *Sill* vs. *Warswick*, and *Hunter* vs. *Potts*, already cited upon this subject of dispute, between assignees and attaching creditors. They put the question, in whom does the property assigned vest, at rest. These cases were decided upon great deliberation, in favor of the title of the assignees—In both of them a particular creditor had attached the property assigned. The question was whether he might lawfully do so? This was solved by enquiring into the title of the assignees, for if the property vested in them, it was needless to go any further. The creditor would have no right to attach.—But the assignments were made in England, and the property attached was, in both cases in America. There the courts were called on to say, whether the assignments conveyed those goods, and it was held that they did. Is there any thing in the case at bar, which will except it from the same rules as governed in those just mentioned? But possibly a nearer view of this case may be taken. *Ex parte Stewart*, 2 *Am. Law journal* 184, was decided by

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a very able judge, in one of the courts of Maryland. The case is interesting, for the very points now in controversy, were involved in the decision. Stewart had made an assignment of all his estate in trust for the benefit of two creditors only; and then applied for the benefit of the insolvent law of that state; but the court could not give him any relief under the insolvent law, because *p.* 187-8. "the act of the legislature was intended to confer a benefit on the debtor, and the ground-work of that benefit was, a surrender of all his property for the benefit of all his creditors." The learned judge then comments upon the validity of a bona fide assignment, at common law, in Maryland, and declares it to be good there—but that the assignor is also subject to the common law consequences of such an assignment, viz. that his person and future property are always liable. This case is in point, and throws great light on the subject. Now Stevenson's assignment is made not under the insolvent laws of Maryland, but according to the common law of that state, which according to Stewart's case is a good conveyance. It may be unfortunate for him, that he made this assignment, since himself and his future property are hereafter subject to the claims of his creditors, should the property assigned not

pon to be insufficient to meet them all: But this cannot alter the effect of the deed, or destroy the rights of creditors at large, to have an equal distribution of the property assigned, which it was the object of the assignment to give them.

II. As to the second proposition, whether the attachment here, will prevent the restoration of the property to the assignees, must depend on this, namely, whether it was the property of Stevenson or of the assignees, at the time of the issuing out the attachment. Has it already appeared satisfactory to the court, that the property belonged to the assignees? The gentleman opposed, will not say, that there was any fraud in this transaction; every one knows the contrary—well, if all this be so, what right had the defendant to attach? A man cannot seize my property, for a debt due from another—In *Lewis & Wallace, Sir T. Jones' Rep.* 223, it was decided, that when a debtor had assigned to a creditor property in payment of his debt, the assignor had no control over it; and that it was not subject to attachment by another creditor: Now what is the nature of this transaction of Stevenson and all his creditors upon the face of it? "I am embarassed," says the former "some of my creditors are harassing me with

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suits; they will sweep all my property away, I will assign it over for the benefit of you all. What court on earth, will not uphold so correct and honest a transaction, so just a distribution.

Again, we have not here to contend with a judgment in favor of an attaching creditor, in a court of the last resort, where it might be urged, that a court of competent jurisdiction having decided the question in whom the property was vested, that could not again be gone into. This is a splendid proposition, to be sure; a very general rule. But there is an exception in this very case, which shews the great length to which courts will go in protecting the property (for all concerned) in the assignees. The exception governs the case at bar, and here it will be seen that courts have broken through that general rule, for the very purpose of giving effect to the laws of countries which recognize the rights of assignees. Thus in the case in 4 *Term Reports*, before cited, Blanchard had become insolvent, in England, at which time he had property in the hands of J. and W. Russel of the state of Rhode Island, and which one of the creditors attached after Blanchard had assigned his estate to assignees. The creditor received his debt under the attachment, the assignees not having time to interpose their claims, but going

over to England, they sued him there for the money, as having been received in contemplation of law, to their use. The court of king's bench, upon great consideration, gave judgment for the plaintiffs, because the property attached, by the assignment was vested in them, notwithstanding the conclusiveness of the judgment which had been given for the attaching creditor (the defendant) was strongly insisted on—such have been the uniform decisions of the courts of law, and courts of chancery proceeding upon the same equitable principles, have all along made the same determinations. In *McIntosh* vs. *Ogilvie*, cited in 4 *Term Rep.* 193 *note*, Lord Hardwick, on being told that the defendant, in that case, had not obtained judgment before the bankruptcy, said "then it is like a foreign attachment, by which this court will not suffer one creditor to gain priority, if no sentence were pronounced before the bankruptcy." Again, in *Solomons* vs. *Ross*, in chancery, 1764, cited in *Folliot* vs. *Ogden*, 1 *Hen. Black. Rep.* 131-2, *note*, *a*. the money which had been paid into court, by the garnishee, on a bill of interpleader, and which had been invested in stock, was ordered to be transferred to the assignees, and a note which the garnishee had given to the attaching creditor, to

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be delivered up and cancelled. In *Jollet* v. *Deupont thiew*, *ib.* before Lord chancellor Camden in 1769, where pending the attachment laid by English merchants in England, upon the property of the bankrupt of Amsterdam, and which he had assigned there—upon the prayer of the assignees, perpetual injunction was granted against proceeding in the attachment, and in the case of *Neill* vs. *Cottingham*, in chancery, in Ireland; there the garnishee had been taken in execution, and paid the money in his own discharge: the Lord Chancellor called in the assistance of several of the judges, and after great deliberation, compelled the attaching creditor to pay the money which he had received, over to the assignees. From these cases it appears, that however the question might be, between subjects of different countries, the policy of the law has been uniform with respect to assignees and attaching creditors, subjects of the same government, in giving full effect to the title of the former. It is unnecessary to repeat, that in the present case the creditor and assignees are citizens of Maryland, they are bound by the laws of their own state, which are the same, as governed the decisions just cited. "The consent of every subject is virtually included in the laws of England, and he is bound

by them accordingly."—*Lord Coke.* Now, it is no answer to these authorities to say, (if the fact were so) that by the laws of this state, such an assignment, entered into here, is not good. Such a law does not, in the nature of things, cannot affect this case. The gentleman must shew a law of this state declaring an assignment void, though all the parties are citizens of the state of Maryland, where it was executed. He must be prepared to go to this extent; for any thing short of it, we maintain, proves nothing against the rights of foreign citizens: but, as this cannot be done, the court will feel itself bound to protect the rights of the parties, be them who they may. In *Robinson* vs. *Bland*, 2 *Black. Rep.* 262, this doctrine is recognized and confirmed. A singular case is there put by Mr. Justice Wilmot:—"There are many contracts not good by the laws of England, yet good in other countries, as a contract for prostitution." It is not necessary to discuss the question, whether such a contract would be good here. The rule of law briefly is—in a controversy between citizens of any country or state, concerning personal property, the laws of the place where they reside must govern the decision of every court, wherever the contest may be carried on.

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But there are two cases which we are given to understand will be relied on by the defendant's counsel, *Le Chevalier* vs. *Lynch*, 1 *Douglas*, 170—and *Simonton's case*, 2 *Martin*, 168. The case in Douglass by no means contradicts the principles contended for. The action there was brought by the assignees of a bankrupt against a foreign garnishee, who had been compelled to pay the money, by a judgment of a court of competent jurisdiction, the assignees not having interfered. The court very properly gave judgment for the defendant—for what could be more clear, than that a debtor, having been compelled by a court of competent power once to pay the money, should not be compelled to pay it again. It would have been manifestly most unjust to have compelled him to a second payment. But the assignees might have recovered the money back from the attaching creditor, as was done in the case of *Hunter* vs. *Potts*, and *Folliott* vs. *Ogden*. Nor does the case of *Simonton* in the least impugn the authorities cited for the plaintiffs. It is understood, however, that a very general idea has been countenanced in the inferior courts, that assignments, made in a sister state, although according to the laws of the place where executed, are a perfect nullity here—and that idea is said principally to

be grounded on this case: but would the learned judges who pronounced the decision be willing to say, that they intended to declare such to be the law? The case does not at all warrant the idea attempted to be drawn from it—on the contrary, when examined, the truth is the direct reverse. But if errors have gone abroad, it is due to the character of the bench to have it explained. Now, what is the case when fairly considered? No more than this—that a defendant in gaol could not make a cession under the laws of this state—nothing more. The counsel, to be sure, went widely into the validity of the assignment. The court, however, thought it unnecessary to decide upon the character of the transfer; but said, admitting the fairness and legality of it, it is perhaps, an obstacle to the *cessio bonorum*; for, by this transfer, the debtor has deprived himself of the means of complying with the requisites of our law. How deprived himself?—because he had made an assignment for the benefit of a few creditors only; and his estate being then vested in the assignees, put it out of his power to assign his estate here, as required by the laws of this state. The case of *Simonton*, then, is not a case against the present plaintiffs, but rather against the defendant—for the court goes upon the ground that the transfer

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vested the property in the assignees at Philadelphia. If the court had not considered, that such was the effect of the assignment, the property must have remained in the insolvent, who then might well have assigned it here, and had the benefit of the insolvent laws of this state.

Duncan, for the attaching creditor. The principles laid down in the case of *Hunter* vs. [illegible] relied upon by the counsel of the assignees, are not applicable to the present. The two cases are absolutely dissimilar. The discharge in that case was under an act of bankruptcy—all the property was, agreeably to bankrupt laws, to be fairly and equitably distributed among the creditors. Any thing like preference—any thing like advantage taken of the debtor or creditor—is destroyed by such laws. But in this Stevenson assigns his property to whom he pleases; he names his own trustees; he prescribes his own terms; he gives his trustees the power of paying themselves in preference to any other creditor; and the residue then goes to whom? To those creditors who will sign a release within a certain period. In the first place, the assignees do in fact take all the property; for they must pay themselves first—and then, and only then, the other creditors come in.

If no property remains, the excluded creditors are deprived of all remedy. Here is downright and unjustifiable preference. In *Hunter* vs. *Potts*, no such preference existed, or could exist. Every thing was distributed as the law commanded. Here every thing must be done at the will of Stevenson. Besides, after pouring out nearly all his favors on the assignees, if any thing remains to evince a fondness for any others, it is only to those who will discharge him within a certain time. Here are terms most positively imposed upon legal, honorable creditors. This court will consider the arrangement of Stevenson as it merits; and will then say whether *Hunter* vs. *Potts*, can assist the plaintiffs in their unwarrantable demands.

It is unnecessary to argue, whether an assignment under an insolvent or bankrupt law would include the property attached; which ever way that question is decided, will not affect the present case. This is a voluntary assignment of Stevenson—and we contended that in principle, and upon authority, the creditor had a right to attach the property in dispute.

The principles of law prevent the property in New-Orleans from being comprehended in this assignment. Admit, for argument's sake, the validity of this instrument, we then say, that

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all voluntary assignments made by the debtor are, when accepted by the creditor, in the nature of a contract between them. Those creditors who accept it are bound by its terms; and unless a special law of Maryland exists, which makes it, when agreed to by a majority, binding on all the creditors, there is no contract between the debtor and those who do not accede to the instrument. Ramsey never agreed to this assignment—he had a right to do so, if he pleased—by not doing so, he is not bound by any stipulation contained in it. The very act of creditors accepting payment under it, proves that some agreement must be necessary to make it binding on them; this is exactly a contract. By not acceding to the contract, they may use all legal remedy to obtain payment; because, when they consent to receive payment from the assignees, they agree to take part for the whole of their debts; when they do not consent, their debts remain in the same state, undiminished and in full force against the debtor. Now, apply this principle to the present case: the property of Stevenson, he assigns over for the benefit of those creditors who will sign the release. Those who accept this condition are bound. Ramsey would not; of course the contract did not extend to him: the law will then give him the

power to obtain satisfaction in the best manner. Besides, because a creditor refuses to accede to an instrument, made according to the mere will and disposition of the debtor, because some of the creditors think it better at once to accept part of their debts than to incur the danger of losing all, is an honest *bona fide*, vigilant creditor, as Ramsey unquestionably is, to be deprived of his right? This court will never sanction such a principle.

Again: in voluntary assignments, a debtor can only assign property within his control, without violating any law of the country where some of the property assigned may be stipulated. We assume this as a correct principle, that though an assignment may be good in the country where made, and it is to be partly executed in another, where the law is different, no court of that country would give such part their sanction, otherwise they would violate those oaths which impose upon them the necessity of administering justice according to the laws of their own state. In Louisiana, its laws are paramount; none others dare come in competition with them; if not, we are without law, and, of course, without justice. A statutory provision enacts, that unless three-fourths of the creditors are willing to discharge the debtor, he still remains bound.

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Another law of this state declares, that no preference shall be given to any creditor. Now, part of this assignment is to be executed in New Orleans; that part is in direct contradiction to its laws, and cannot, surely, be enforced. Now to this it is no objection to say, that it is personal property in dispute, and, therefore, must be governed by the laws of the country where the owner is domiciliated. This is a correct principle when it does not countervail any law of the country where the property is situated. We call to our assistance the so much boasted case of 4 *Term Rep.* 193, for a positive confirmation of this principle---Lord Kenyon's opinion beginning with "and that it does so pass," &c. We, therefore, contend that, from this undeniable authority in our favor, the rules regulating this property in dispute, must be according to the laws of Louisiana and not of Maryland.

We still go upon principle, and further contend, that there is a great difference between an assignment made under an insolvent or bankrupt law, and a mere voluntary one of the debtor. The word voluntary means, without a valuable consideration. This is the word, and meaning given to it as used in English statutes, contradistinguished from a valuable consideration; as an example, the statute 27 *Eliz. c. p.* 4*th*, is part-

larly referred to, and 1 *Atk.* 94, gives the same meaning, 2 *Vesey* 14, is an authority completely in support of our position. Hardwick there held that a voluntary conveyance, though without fraud, is void against creditors, if indebted at the time. Even a good consideration, one depending upon the relationship of the debtor, is not sufficient or able to divest the property so as to cut out the rights of a creditor. In all cases where assignments for the benefit of creditors, made in another country, have been ratified by courts, those assignments have been made under insolvent or bankrupt laws, and were not the voluntary ones of the debtor. We are not disposed to question the validity of these decisions, because they do not affect the present case. But no case can be produced ratifying, in the same extensive manner, an assignment made according to the mere will of the debtor alone, who may prescribe his own terms: these terms, when accepted by the creditors, are then binding, and only then, agreeably to the principles before laid down, that it is but a contract. Besides, if a voluntary assignment were as effectual as one executed according to the provisions of a bankrupt or insolvent law, where would be the necessity of calling it a voluntary one? The term must certainly be employed for distinction's sake; if not,

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there is, then, no difference in these species of assignments. The word "voluntary," must mean something or nothing. If it have any meaning at all, it would evidently convey an idea of distinction, that the law and the courts did not give it the same interpretation or effect; that, in fact, it must be viewed as a conveyance totally different from one executed according to law: if it can convey no meaning at all, the word is unnecessarily employed, and only produces error and confusion.

Another principle of law, on which we rest this case, will easily present itself to the attention of this court. This property cannot be comprehended in the assignment of Stevenson, unless the assignees had a delivery of it. The assignment itself did not give them this delivery, and we venture to say that no decision can be produced which would support such an argument. A delivery must be actual or legal: no actual one was given in the present case, and we conclude there was no legal. This assignment is to be considered in the same light with a transfer of the property of the debtor to his assignees. Taking the opposite side on their own ground, we must suppose it to have a valuable consideration, and therefore very much bearing the features of a sale. To effectuate a transfer

there must be a tradition of the thing transferred—a legal *bona fide* tradition. The will of the debtor alone will not give the delivery. If the property was corporeal, it should, to have given the title to the assignee, so as to cut out this attachment, have been absolutely put into the possession of the assignees or some agent in this city for their use; if incorporeal, the titles or the documents necessary to constitute the title, should have been received by him for their benefit. In support of these principles we cite the important case of *Dumford* vs. *Brooks' Syndics*, 3 *Martin*, 222—where the point for which we are contending is luminously handled in the opinion of the court. We refer the court with great pleasure to this decision, as containing all the doctrine on this subject. But one citation we will make, it is this: the court are speaking of the requisites of a good delivery, and in arguing on this point they say that "delivery may take place by the actual consent of the parties," this principle with redoubled force applies to this case; none of the other requisites of a delivery are complied with by Stevenson's assignees:—Ramsey refuses to consent to the transfer of the property, which is one of the requisites laid down by the court, and of course as regards Ramsey, there is no delivery:—

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It will therefore f llow that, as to him or any other creditor who refuses to subscribe to the assignment, the property of Stevenson is open to an attachment. This is our case exactly; on this principle we attach the property: and on this principle we claim it at the hands of the court.

We will now present the court with a few cases, and will premise that so many have come up in examining this subject, that it would tax their attention to submit them all. The most prominent will be produced.

Kirby 313. *Taylor & al.* vs. *Glary & al.*— We think it a strong case in support of our claim; we merely quote the books for the court, without relating the points on which these cases turned, or the principles decided. In support of the point settled in Kirby, we agree that, in these American states, there is no difference between them, as considered among themselves and any foreign country. Each state is independent; its laws are not extra-territorial; in all their proceedings they consider each other as a foreign state. The constitution of the United States views them in the same light, each governing itself, without the interference of any other. The opposite side in their argument admits the independence of the states. If so,

the case in Kirby completely applies. The court there held that a commission of bankruptcy in England did not comprehend the debtor's effects in Connecticut. England and Connecticut were foreign and independent countries. If the principle above laid down is true that each state is foreign as regards the others, this court agreeably to the "*stare decisis*," will hold that this property would not pass under an assignment, executed according to an insolvent or bankrupt law, much less under the present voluntary, objectionable, and unjust one. 2 *Johns. Rep.* 198. *Smith* vs. *Spinola*, the court laid down a rule which we contend applies irresistibly to the present case. "The *lex loci* must govern in the construction of contracts, and the remedy on them must be prosecuted according to the laws of the country in which the action is brought." 7 *Johns. Rep.* 117, *White* vs. *Canfield*, confirms this doctrine. The remedy, in this action, is sought for in this court; that remedy must according to the laws of this state. 3 *Dallas* 369, *Emory* vs. *Greenough*, decided by judge Iredell, will shew the court the opinion entertained by that able judge, of the nature and extent of discharges under insolvent or bankrupt laws. In 1 *Washington's Rep.* 199 *Payne* vs. *Dudley*, the court in speak-

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ing of an insolvent's discharge, says "that courts of equity never interfere to deprive the plaintiff at law of any legal advantage which he might have gained, unless the party seeking relief will do complete justice, by paying what is really due." By plaintiff at law, the court meant a creditor who had resorted to the law for the satisfaction of his debt.

Lord Hardwick, in 1 *Atkins* 153, *ex parte* Ward, evinces his partiality to honest, *bona fide*, creditors. One of the principles in that case is that a creditor may either prove his debt under the commission, or pursue his debtor at law. This is our case, Ramsey would not accept of a share under Stevenson's assignment, and had pursued his debtor at law. *Dougl.* 160, The assignment of a bankrupt's estate is binding only in the state in which it issues. 2 *Beawes Lex Merca.* 516, 6 *edition*, contains an opinion given by Lord Chancellor Talbot, when at the bar. That opinion was, that a certificate confirmed in England would b no discharge to the person sued, if a suit had been brought against him in Virginia, on his going into that country. But an English case on which we strongly rely, and which never has since been overruled or even questioned, is to be found in *Dougl.* 169 *Chevalier* vs. *Lynch*: in that case

the money was attached according to the law of the place. The assignees claimed it, Lord Mansfield held that the assignees could not recover the debt. This court will, when considering that this was a decision of Lord Mansfield, who seldom erred, whose determinations were always, except when prohibited by positive law, upon the plain and infallible rules of natural justice, surely give this case all the weight and importance it so justly merits.

But one other authority upon which we rely with the utmost confidence, and then we will relieve your honors from so tedious a research upon a point which we believe to be so plain, and so well settled as we conceive. It is in Simonton's case, 2 *Martin* 102, which must be so well remembered by your honors, that we will not detain you by relating the principles therein decided, but content ourselves by a reference to the book, and though the idea may possess the gentleman that it is not in opposition with the principles contended for by him, we will leave the examination of the similitude of the two cases to the better judgment of this honorable court, as we admit the principle that every man has a right to dispose of his property as he pleases; the opposite counsel have granted that there are exceptions. This case is one of those

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exceptions, that a debtor cannot convey property to the prejudice of his creditors. We contend that if the claim of the assignees is allowed, this right will be given by the court: and more, will it not also deprive us of all remedy? where is the recourse left, should the appellants succeed? They, no doubt, from the anxiety shewn in this case, are not yet paid, and the property now claimed will enure to their individual benefit: the balance if any to be distributed to those who have acceeded to the will of the debtor, while we who thought that by the laws of civilized nations it required more than the will of one to bind, and resorted to a plain remedy, sanctioned not only by the principles of law, but the principles of equity and justice, will be debarred all rights, unless this court interposes its authority and protection in our behalf, and closes the door against the unjustifiable pretensions of the assignees. It is unnecessary, as the counsel contend to supœna any statute of Maryland, to give us its testimony in our favour; but if we should quote them as binding authority, we would refer to the 2 *American law journ.* 184. wherein it will be seen, that by the act of 1805, and the supplemental act of 1807, of that state, such an assignment as this would not avail against creditors, being in our opinion in every

respect similar to the case of *Steuart & alii*, who were refused relief by chief justice Nicholson; "the legislature certainly intended" says the learned judge, "to place all creditors on an equal footing by providing for an equal distribution of the debtor's effects, in proportion to his debts. It could not be their intention to allow him to give a preference to one, and to deny at the same time his liability over to the others, such a provision would be iniquitous in the extreme;" if we are correct in the analogy of the two cases, the above quotation will suffice for the many enquiries of the learned gentleman, and will obviate the necessity of answering to the distinction where the parties litigant are citizens of the same state, and where the attaching creditor is of a different state.—This court is not bound to presume "*omnia recte acta esse*." The presumption one way or the other will not decide this case, the court is called upon to say, how far they will give effect to an assignmen, when part of the instrument is to be executed in New-Orleans, and is against a direct provision of its laws, in favour of attaching creditors. The courts have always looked upon these voluntary assignments with peculiar jealousy—great power is given to the debtor; every feature should be critically examined,

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and unless the most exact and scrupulously impartial justice is rendered, the courts should destroy them; they ought not in any form to injure the rights of creditors; no preference should be given among those who relied on the honor and credit of the debtor; every thing should be as fair and as legal as the most rigid justice could demand.

The opposite counsel have asserted, that this assignment will be executed by this court, upon the principles of comity; we ask if this is one, to the execution of which, the comity of law can be properly called? Is there in it that fairness, equity and equality of distribution of all the property among all the creditors, as to justify this court in forcing it to the prejudice of an honest creditor, who refuses to be thus deprived of a just debt, and resorts to a right recognized by our laws?—a right which must be sustained gainst so partial an instrument. Or rather does not the very face of the deed shew the preference given the trustees—one not authorized by the laws of any country, but made valid only by the consent of those who accede to its terms. Is not this preference in fraud of creditors?—What court will so proceed against law, reason and justice, as to give its sanction to so fraudulent an attempt at the overthrow of right?

We now leave the case to the court. These are the principles and authorities upon which we ground our claims; we call on this court at once to say, whether a debtor can have the sanction of the law, in doing that which reason and the common sense of the world disown.—We wait to know whether a debtor can say to one creditor, take all my property to pay your debt; to another, I will deprive you of all satisfaction, you shall have nothing to which you can resort, you have confided in my honor and in my integrity, the law will authorise me to violate these sacred ties, your debt is now a nullity. These are the principles, advocated by the assignees, they demand the protection of this court to support them in a claim, bottomed on a violation of the eternal principles of equity, and impartial justice; with the vig lance and integrity of Ramsey on our side, with the hardiness and the avarice of the assignees, that grasp at all, to promote the interest of self on the other,—this court will not long hesitate in their decision.

Dick, United States' attorney, in reply. The original parties to this action, as well as those intervening—the present appellants—are all citizens of Maryland; and it is not denied, that,

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by the laws of that state, the assignment in question would be held good. Here, then, the question would, seemingly, be at rest. But, on the other side, loud and reiterated charges are rung on the odious epithets "fraud," "preference," &c. With respect to the first, there is no proof, nor ought there to be any suggestion. As regards the other, let it be admitted, and what is the consequence? Simply, at most, to deprive the assignor of some privilege he might seek under the laws of Maryland; but in no manner operating the avoidance of the assignment. That was *bona fide*, upon sufficient consideration, and by no means novel or extraordinary. But, says our learned opponent, it was voluntary, and, therefore, fraudulent! "The word voluntary means, without a valuable consideration." This is a definition promulgated for the first time; and, like many others of the propositions in the same argument, advanced with a boldness proportionate to its insufficiency, and relied on with security in proportion to its weakness. The term voluntary, as it relates to conveyances of this nature, is peculiarly significant, and, it was supposed, could not easily have been misunderstood: a voluntary conveyance is one originating in the will of the party, and is used in opposition to forced. An illus-

tration of this signification is very familiar, from the use made of these terms in our law regulating the *cessio bonorum*: there the distinction is forcibly given, when speaking of voluntary and forced surrenders. Voluntary conveyances, under the rigid principles of the bankrupt law of England, are never avoided as such; it is only where they are attended with circumstances of legal or actual fraud, that they are declared void, as when made in contemplation of bankruptcy, and giving an undue preference. The nullity, of the latter description, is the effect of the positive law, and in relation to a particular system—the principle was unknown to the common law, and it is unknown to the institutions of most of the states of the union, and, amongst others, to those of Maryland.

The insolvent law of Maryland has a clause denying the benefit of the law to persons who give an undue preference to their creditors; but this law by no means declares the act giving such undue preference null and void. The expression of the law is as follows: "hath assigned or conveyed any of his property with an intent to give an undue and improper preference;" and "any deed, conveyance, transfer, assignment or delivery of any property, real, personal or mixed, of any debts, rights or claims,

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to any creditor or security, made by any person with a view or under an expectation of being or becoming an insolvent debtor, is such an improper preference as is here intended." 1 *Law Journal*, 100. Here the provisions are very strong, and doubtless very proper. But their very strength and positive enactment shew, that, while they apply to the cases of persons applying for the benefit of the insolvent law, they do not apply to any other. Nor, in that case already stated, is the transfer declared null and void.

Herein they differ from the bankrupt law of England and the late bankrupt law of the United States, and, indeed, upon principles which distinguish bankrupt from insolvent laws. By those laws, such an assignment or transfer would be held to be an act of bankruptcy in a trader, and would be declared void. But, under the laws of this country, generally, no such rule prevails. Here the debtor is permitted to choose his creditor, and, if there be no fraud; if the payment, transfer or conveyance be *bona fide*, the creditor or transferee is entitled to the benefit of the preference he has received. It is, when the debtor comes forward to ask the benefit of the law, discharging him from custody or from his debts, that the subject is canvassed, and it is upon him that the consequences fall.

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In this case, if Stevenson were to demand the benefit of the insolvent law, the transfer or conveyance to the appellants might be objected to him: but it does not appear that Stevenson has made such application, or that he ever will, or if he had or did, that it would affect this subject. The assignment in Baltimore, has invested the assignees with all the property described in the deed; and the appellee knew too well the operation of the instrument to attempt disturbing it. The counsel for the appellee have fallen into an extraordinary error in relation to the principles just considered, when noticing the decision of chief justice Nicholson, in the matter of D. C. Stewart and others, petitioners for the benefit of the insolvent laws of Maryland. 2 *Law Journal*, 184. That was a proceeding under the Maryland insolvent act, analogous to the issue directed by our insolvent act of 1808, "where fraud is presumed or charged by any of the creditors." The parties in that case having assigned all their property for the benefit of a few creditors, applied for the benefit of the insolvent law. "The question for the decision of the court is," says Judge Nicholson, "whether this is 'an undue and improper preference of one creditor or security,' in contemplation of the act of 1805, to deprive the parties of the

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benefit of that act." The whole reasoning, and the decision of the case, turn upon the subject of applications for the benefit of the insolvent laws—the title of the assignees, or preferred creditors, in the property or credits transferred to them by the debtor, is never once questioned. Such an enquiry, indeed, could not have arisen under the laws of that state, nor could it, I humbly conceive, under the laws of this, have arisen, until the act of the 20th February, 1817, relative to voluntary surrender, &c. By the 24th section of that act, it is provided—"that any debtor who shall have sold, engaged or mortgaged any of his goods and effects, or having disposed of the same, or confessed judgment, in order to give an unjust preference, &c. shall be debarred from the benefit of this act, and the said deeds or acts shall be declared null and void."

It may be proper further to remark, as strongly illustrative of the truth of this reasoning, that Judge Nicholson, in denying the benefit of the act to Stewart and others, goes chiefly upon the ground, that they had already divested themselves of their property. "How," says he, "is the spirit of the act complied with, when a man assigns the whole of his property to-day

to one creditor, and comes in to-morrow, offering to surrender that which he has before disposed of, and which he has not, for the benefit of the others?" 2 *Law Journal*, 188.

The paragraph following the sentence last quoted, and upon the same page, is, I conceive, conclusive—its direct bearing upon the subject at bar will, I hope, be a sufficient apology for citing it at some length:—"It is," says the authority, "agreed that, at common law, a man may pay all his property to one creditor, in discharge of a *bona fide* debt, to the exclusion of all the others, and that this act of 1805 does not take away his right of giving a preference. Of this there can be no doubt. It is a right with which the act does not interfere. It only declares, in substance, that if a debtor does insist on and exercise his common law right of prefering one creditor to the exclusion of all the rest, he must take the common law consequences. His person and his subsequently acquired property must remain liable to the claims of his excluded debtors," &c.

Simonton's case was that of a debtor in confinement applying for the benefit of the *cessio bonorum*.

It was considered by the court in two points

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of view: 1, "whether a debtor in prison could make a cession under the civil code? and 2, Having assigned his property for the benefit of a few creditors, and having nothing left, whether he was entitled to the benefit of the law? The decision was against the application, on the first ground; and the reasoning of the court alike against it, on the second. But the decision here was purely personal to the applicant, and did not, in the most remote degree, question the validity of the assignment made by him. The assignment made by Simonton was fully discussed, and considered with very great attention at the time, as well by the superior court of the territory, as by the district court of the United States: in neither, was the deed declared invalid or irregular, so far as it respected the assignees, or the property preconveyed by it. On the contrary, Simonton, who acted as attorney in fact, for Williamson and Stephens, his assignees, brought suits in the district court of the United States, in their names, for property and credits conveyed in his schedule, and in which the assignees recovered. One case was *Williamson* and *Stephens* vs. *Lee* and *Clague*, syndics of William Brown, deceased, and his estate insolvent.—Brown had purchased goods of Simonton (pro-

vious to his assignment,) which remained unchanged in his (B's.) possession at the time of his insolvency, which took place shortly before his death. The claim upon Brown was assigned amongst the general debts of Simonton. Simonton, it is well known, was followed here by a creditor named Muirhead, who imprisoned him and proved his debt to a large amount. The total inability of Simonton to discharge the judgment in Muirhead's case was ascertained before the recovery from the Syndics of Brown, and Muirhead's counsel interposed in the United States court, alledging the insufficiency of the assignment to carry the property there recovered. This interposition was at the time, considered an experiment, and proved an unsuccessful one. The counsel of Muirhead never thought, indeed, that they had any other recourse than against the person of Simonton :—at the time of commencing their action against him, they knew of the claim on Brown's estate, and of other claims to the amount of upwards of $50,000 in Louisiana, which had been transferred by Simonton, to Williamson and Stephens, but they never, except in the instance I have stated, looked to this fund for the discharge of their judgment, or attempted to question the assignment.—Surely every feature of

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this case, and its incidents, are powerfully in aid of the appellants. In Simonton's case, 4 *Martin*, 104, a citation is made from judge Nicholson's decision, 2 *Law Jour.* 189, which, as it is there given by the counsel, lays down principles by no means warranted by that authority, or, as far as I know, by any authority. I will not trouble the court by citing the passage at large: but it will be discovered that if the counsel had given the whole sentence, instead of the last member, the doctrines would apply, not generally, but exclusively to "authorities under the bankrupt system."

It is said that Morrison's assignment was voluntary, and that therefore, the creditor might attach. But how does a voluntary assignment give any more right to attach, than a forced assignment (as one under insolvent or bankrupt laws is considered to be) would do? We had thought and believe we have shown, that the effect of both classes of assignments is, in this respect, the same. No argument is used to destroy the reasoning, or weaken the decisions employed by the gentleman, my colleague, to prove this position.

But it is said that this assignment cannot bind the appellee, inasmuch as he is not a party to it. Now, it may be true that he is not a party,

and yet that fact not affect this cause, as in truth it does not; because, if the property, by the assignment, was vested in the assignees, there is an end of the question. The counsel opposed, have not even attempted to say that this is not so, and they could not, for it is submitted that this has been clearly proved. Then what right had this creditor to attach property belonging to the assignees, to obtain payment of a debt due from another? We must be now living in times, such as never before existed, since civil society began. The gentleman must fancy us returning back to that state of existence, in which we found the aborigines of the soil. But, it is said, the assignment was voluntary, and therefore, not binding; because a voluntary assignment means, "without a valuable consideration." But he is mistaken in this point, as has already been shewn. The authority of the counsel, and of courts are voluntarily arrayed. Without further examination, we are content that this court decide between them. Then, he says, no authority can be shewn, where a voluntary assignment would operate, to transfer property, situated as that in dispute, now is. Many authorities have been already cited to this very point. If this had been recollected, probably this assertion would

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not have been made. Two more however, are recollected. They are cited; *Newland on Cont.* 374-5—one of them, particularly, was like the case at bar, in all respects. A person in failing circumstances, assigned over all his estate to a creditor, in trust, to sell it, and raise money for the payment of all his debts—held that the assignment was good, and operated to transfer all the debtor's estate.

But, it is further urged, that a voluntary assignment can only transfer property situated in the place where the assignment is made. Now, this is a great mistake—1. Because personal property is always governed by the *lex loci* of the country where the owner has his *domicil*. 2. Personal property always draws to its owner the possession. 3. Where, from the nature of the assignment, actual possession cannot accompany the deed, it is dispensed with—as, the sale of a ship at sea, conveyance of personal property in another country, &c. *Newland on Cont. 375-7—Term Rep. 72.*

There it is said, that the assignment is good in the place where it was executed; yet, if it is partly to be executed in another place, where the law is different, the law of the latter place must govern. Now, it is, perhaps, impossible for such a case to exist. The question always

it, what is the law of the country where the contract is to be executed and consummated. Indeed there can be no such thing as a contract partly to be executed in two countries. But, suppose there is any thing in this idea, in point of fact, what has this court to do with it, inasmuch as no part of this contract between Stevenson and his assignees was to be executed in New-Orleans. The assignment says nothing about paying the appellee in New-Orleans. It is useless, therefore, to say any thing about it. This court will decide according to the law of the state of Maryland, where the contract was to be executed, of which all the parties are citizens, and of course subject to its laws. This is the true rule. The counsel have evaded this settled principle of law, and talk about this court's violating its oath; if it were to decide that this assignment is good; because, say they, the statute of this state requires that three-fourths of the creditors shall sign off their claims, in order to discharge the debtor. Well, this may all be true enough in the abstract; but the gentleman forgets that the assignment in question was not made under the insolvent laws of this state, but under the common law of Maryland. Let it be shewn that the instrument is not good according to that law. But it has not been, it

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cannot be shewn, that any law of this state declares this transfer, or one made in Maryland, under the same circumstances, void. Let us pursue the counsel, however, in their course.

They have embarrassed the cause with much matter totally irrelevant; and the confusion which they create almost defies an attempt to answer them—but respectful considerations induce this reply. What then is next urged by the appellee? Why, in substance, what has been before observed on, admitting that personal property is governed by the domicil of the owner; they contend, however, that the laws of this state, being about to be violated, the assignment is not good, though they do not shew us how the law is infringed.

Now, the gentleman again talks about a voluntary conveyance, and asserts that it means "something or nothing." That we admit. Then it is alleged, that it means "without a valuable consideration." That we deny; and we have shewn that it means no such thing. But how are we to get over the statute of 27 *Eliz.* referred to in 1 *Atk.* 94? There, it is said, a full exposition may be found. Let us see whether that case has any thing to do with this. The question there was, whether a conveyance of a large estate, made by a father to his child, was

good, it having been done on the eve of his bankruptcy, and the statute of *Eliz.* having enacted, that no such conveyance should prevail, unless made with a good and valuable consideration, and it was expressed in the assignment that the consideration was five shillings, which the court said was an insufficient consideration, and ordered the property to be conveyed to the bankrupt's assignees. But it is no where said that a voluntary conveyance means without consideration. Here again the counsel have mistaken their own authority; and really what has this court here, to do with the construction of a British statute?

Pursuing the learned counsel, the next step we are met with more of the history of *Eliz.* 2 *Vezey*—great fondness is discovered for the reign of this virgin princess—again, this court is required to construe an act passed at an earlier period of her life—the 13th year of her reign. That too, was a statute made to prevent fraudulent conveyances; and the question in the case in *Vezey* was, whether an assignment made without any consideration, other than love and affection, was good? Lord Hardwicke very properly held it was not. Though his lordship does not say, (as we might be led to conclude from what fell from the opposite counsel,

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he had said) that a voluntary conveyance means without consideration. But, although the case has nothing to do with the one at bar, it may gratify the counsel, who have taken care to cite it, to be informed that it has been overruled in *Cowper's Rep.* 710–11, 1 *Atk.* 265, 2 *Browne* 90.

Again: it is argued that in this case, there was no delivery of the property assigned; that in law there can be but two species, one legal, the other actual. This is good law, it is admitted; but can it be said of the property in question, that there was not a constructive and legal delivery? Enough of this has been said already. The argument of the opposite counsel is as good for the assignees as though we had made it for them. It is unnecessary to make any observation upon the particular objection, that there was no delivery of this property to Ramsey, though it is singular, to be sure, that Stevenson should be censured for not delivering property to that gentleman after he had assigned it over to others.

As to the case in 3 *Martin* 222, that case is not denied; it is admitted to be good law, and we had intended to cite it, as very much to the present argument. We think the counsel was unfortunate in selecting this case. Let the question now be, whether there has been a sufficient

delivery? "Delivery may take place by the mere consent of the parties," says the court. We can assure the counsel, that both Stevenson and the assignees consented to this assignment. This expressly appears from the instrument itself, under their hands and seals. What more is required? Nothing, according to their own authority.

Kirby, 318, a Connecticut reporter, is next relied on; for what purpose the counsel have not exactly informed us; but they have informed us of what is not to be found in that authority, viz. that the debtor's effects in Connecticut did not pass by an assignment under a commission of bankruptcy in England. The question was, whether defendants, who had been discharged under the bankrupt laws of England, could be sued in Connecticut, held that they might, because the plaintiffs had not accepted of a dividend of the bankrupt's estate.

We thank our adversary for the three cases next cited, in 2 *Johns.* 198, 7 *ib.* 117, and 3 *Dall.* 369. As to the first case, the *lex loci* must govern in the construction of contracts, and the remedy on them must be according to the law of the country in which the action is brought. We only ask the court to adopt this rule. "The *lex loci* must govern in the con-

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struction," &c.—that is, in this case, the laws of Maryland must govern. Next, the remedy, that is, whether the party may be held to bail—whether a *capias* or summons—whether a declaration or petition, &c. &c. must be according to the place where the suit is brought. The gentleman has chosen the form of attachment—to this we have not objected. As to the second case, that is to the same point, and exactly proves that the rule is universal, that the law of the country, where the contract is to be performed, must govern. As to the third case, although it has been admitted, whether it be good law, yet, as the gentleman has introduced it, he cannot object to the doctrines it contains; it recognizes the principle, that the law of the place where the contract is to be executed, must govern. Thus the defendant there, who had contracted a debt in Massachusetts, but who was discharged under the insolvent laws of Pennsylvania, was not allowed to set up his discharge in bar of the action. We believe this decision was right. The supreme court of this state has ruled the same point; but there are contrary decisions, as in *Miller* vs. *Hall*, 1 *Dall.* 229.

The case in *Washington*, 199, is not in point, or rather it proves nothing to the present case.

There it is said, "courts will not deprive a party of a legal right;" we say so too; they cannot, (excepting always the ordinary common law and equity distinctions in England)—and we believe it will not be done by the court in this case. But what are "legal rights?—that's the question. What was said by Lord Hardwicke, in 1 *Atk.* 153, has still less to do with the case now before the court; there the question was, whether a creditor, who could not prove his debt under a commission of bankruptcy, might not still sue—and it was held that he might, of course. But the lord chancellor does not say that a creditor might attach goods which the debtor had assigned over to others—no such thing. The goods being vested by the assignment in the assignees, puts it out of his power; he must come in with the rest of the creditors. But if the counsel for the appellee had looked to the next page of the book just cited, he would have seen a case directly opposite to his opinion of the necessity of an actual delivery of the thing assigned. It is the case of *Brown* vs. *Dodson*, and determines, that a sale of a personal chattel, as a ship at sea, is good, though no actual possession was given; for the rule is, that, where the property lies out of the place where the assignment is made, then, by opera-

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tion of law, the delivery takes effect by construction. What cannot be done in the nature of the thing, shall not be required.

The case in *Douglass* 160, does not prove that an assignment is binding only in the state where it is executed. The counsel altogether mistake the true state of the question. *Le Chevalier* vs. *Synet* has already been shewn not to affect the present case. The question there was, whether a party, who had been once compelled to pay money by the judgment of a court of competent jurisdiction, should be compelled to pay it over again. That is not the question before this court. The court is requested to decide this cause between citizens of Maryland, according to the laws of their own state.

Fraud, it is admitted, vitiates in every country the contract to which it attaches—that is, where the fraud is actual or inherent, as contradistinguished from legal: the first is positive, the other varies with the varying institutions of different communities, and is constructive. For example, in the case in question, if Stevenson, who has conveyed property to the amount of nearly half a million, and purporting to be all he possessed, had concealed any portion of his effects, the fraud would have been positive, as respected that portion; and any of his creditors

might have resorted to it, as they can to his person, or property acquired after the assignment. Again, by the laws of this state, a debtor is incapacitated from making "any alteration in the situation of his creditors, by acts of security or preference, as much to the period of his being able to pay his debts, as to the time of his committing such acts as would, by the bankrupt laws of England, amount to acts of bankruptcy." 8 *Martin*, 275-6, *Brown* vs. *Kenner & al.*— Therefore, "acts of security or preference," of this description, would be considered fraudulent, under our laws. But this is constructive fraud; because, as has been shewn. 2 *Law Jour.* 188, "there can be no doubt," that at common law, and in Maryland, "a man may pay all his property to one creditor, in discharge of a *bona fide* debt to the exclusion of all the others;" and this principle, as prevailing in other countries, is recognized in the case of *Brown* vs. *Kenner & al.* just cited, where it is said, that "the circumstance of insolvency alone," under the bankrupt laws of England and the United States, "is not held sufficient to invalidate the transactions of a debtor with any of his creditors."

MATHEWS, J. delivered the opinion of the court. On the part of the assignees, it is con-

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tended, that the deed of assignment is good and valid, according to the laws of Maryland, under which it was executed and the contract was made, and it ought to be enforced by the court of this state. To this end, they liken it to an assighment, made under the bankrupt laws of England, and cite adjudged cases from the courts of justice of that country, shewing how strictly and extensively they are carried into effect.

Were it necessary to a proper decision of this case, we are of opinion that it would not be difficult to shew such a difference between assignments, made at the mere will and pleasure of debtors, in which they attempt to lay down rules for the payment of their debts, and the distribution of their estates, and those, which are fairly executed under a commission of bankruptcy, as would require the application of principles almost totally different in different cases.

In assignments under a commission of bankruptcy, great pains are taken to discover and collect all the debtor's property. The assignees are chosen by the mass of his creditors, and the effect of the assignment is fixed by law. The proceeds of the estate are to be paid and distributed, according to established and known rules. But, in voluntary assignments by debtors, they chuse their own trustees, determine the manner

in which their debts are to be paid, and too often attempt to give illegal and unjust preferences.

These points we deem it useless now to discuss; and it is believed that our decision must be directed by the principles of law recognized in the case of *Dumford* vs. *Brooks' syndics*, 3 *Martin*, 222, 269.

The instrument by which the debtor undertakes to transfer his property to the trustees, must be considered as a contract between him and the persons entrusted with the execution of his intentions, in regard to the payment of his debts, and the distribution of his estate. If his conduct has been fair, and his intention honest, in this transaction, (which we do not undertake to decide) perhaps they have a right to hold the property, as far as it has been actually delivered to them, until they shall have fully executed the trust reposed in them, and creditors who may have assented to the terms of the cession would probably be bound by it. But the assignment can certainly have no greater effect, in relation to creditors not parties thereto, than a sale to a *bona fide* purchaser, which, unless accompanied by delivery, does not fully divest the seller of his property, and leaves it subject to be seiz-

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ed by his creditors, according to the principles laid down in the above case.

The parties to the deed of assignment appear to have been aware of the impossibility of transferring by it, a complete dominion over such things as *choses in action*, according to the common law of England; for we find in it a power granted to them to use the assignor's name, if necessary.

Upon the whole, we are of opinion, that the property attached, not having been delivered to the trustees, has been regularly subjected to the payment of the debt of the attaching creditor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs. See *Norris* vs. *Mumford*, 4 *Martin*, 80.

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If the creditors refuse the cession of the debtor's goods on allegation of fraud, though the court direct an assignment to be made to the sheriff, in trust, the insolvent is not entitled to his discharge.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The insolvents, being confined for debts, presented a schedule of their estate, and prayed for a meeting of their creditors, for the purpose of tendering to them a surrender of their pro-

perty; that surrender was refused, upon an allegation that it was a fraudulent one. The counsel for the insolvents then took a rule on the creditors to shew cause why a syndic should not be appointed by the court; and on their not shewing cause, the court appointed for syndic the sheriff of the parish of New-Orleans, and ordered the insolvents to make an assignment of their property to him, in trust, for their creditors. The assignment was accordingly made, and the insolvents then prayed to be discharged from imprisonment. From a refusal to discharge them, they appealed.

We think that the judge of the district court did not err in refusing the application of the appellants. Pending the accusation of fraud, it was not known whether they would be entitled to the benefits of the cession, one, and the most important of which is, the release of the debtor's body, and his future exemption from arrest for the debts heretofore contracted; that benefit is the effect of a cession *bona fide* made. Here that good faith was in question; and while it remained undecided, the appellants could not claim the benefits which were to arise from it, when proved.

But the appellants thought that, since the judge had deemed it proper to appoint a syndic

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ex officio, "with a view to the interest of all concerned," and to order an assignment of the debtors' property to be made to that syndic; therefore, the business of the cession was at an end, and they might go at large. If such was to be the result of the appointment here made by the judge, there would be no hesitation in saying that it was an improper decree to be rendered under the circumstances of the case, because the effect of it would be to force the cession upon the creditors, a measure which is authorized by law only in cases of *bona fide* cessions. But we do not view that nomination as a step so decisive. It is evidently no more than a conservatory act pending the suit on the question of fraud, and is well authorized by the sections 26 and 29 of the late law on voluntary surrenders.

As to the assignment which was ordered to be made, and was accordingly made, to the syndic by the appellants, it is an act unknown to our laws in matters of cessions, and, as such, may be deemed a nullity in point of form; but as the power of syndics over the estate of the debtor, as they exist by law, are fully as ample as those which may be exercised under an express transfer of the property by the debtor, and produce the same consequences, we do not

deem it equitable to disturb the present state of this case on account of a mere irregularity of form.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Livingston for the insolvents, *Smith* for the creditors.

DUBREUIL vs. *DUBREUIL.*

APPEAL from the court of the first district.

The appellant must in all cases give security for costs.

A statement of facts must be signed by both parties, or persons authorized by them.

DERBIGNY, J. delivered the opinion of the court. In this case the appellee objects to the appeal as irregularly brought—1. Because no security for the costs was given by the appellant—2. Because the statement of facts, which purports to be agreed upon between the parties, was not assented to by him.

In all cases of appeals, whether execution be stayed or not, the law makes it the duty of the appellant to furnish security to answer the costs. This is a condition without which he has no right to call his adverse party before the

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appellate court. If he does, the appeal is irregularly brought, and ought not to be heard.

But, independently of that circumstance, there is one feature in this record, which must decide the court to dismiss this appeal. The statement of facts is not signed by the appellee, nor for aught that appears, by any person for him. The counsel appointed *ex officio* to the absent heirs of John Dubreuil, part of whose estate is disputed by the appellee as his brother, has signed that statement; but nothing shews that he signed or had any right to sign in any other capacity.

When the appellee's power of attorney was received, his present attorney in fact signed, himself the petition, which he presented in his name to the court of probates, thereby evincing the intention of prosecuting his claim in person. It does not appear that he employed any attorney in the probate court. The statement of facts ought certainly to have been communicated to him, and is a nullity without his assent.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed.

Carleton for the appellant, *Seghers* for the appellee.

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Murray vs. Murphy.

If two persons, married in Hispaniola, and in community of goods, remove to Charleston, and the wife dies, the community will not continue between the husband & the children.

A sum reckoned in *livres*, in a contract entered into at Hispaniola, is not to be paid in *livres tournois*.

MURPHY'S HEIRS vs. *MURPHY.*

APPEAL from the court of probates of the parish of Orleans.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs and appellants are the legitimate children of the late Don Diego Murphy, consul of Spain at New-Orleans, and of Mary Creagh, his first wife, between whom there existed a community of goods. They pretend that, no steps having been taken since the death of their mother to cause that community to cease, it has continued between them, their father and the defendant, his second wife; and that the estate left at the death of their father ought to be divided accordingly.

The material facts in the case are these. In the year 1789, Don Diego Murphy, being then at Cape Francois, in the island of Hispaniola, married the mother of the appellants, Mary Creagh. The contract of marriage stipulates a community of acquests and gains between the parties, to be regulated by the custom of Paris, even though they should afterwards reside in countries where different laws should prevail. Some years after, they came to live at Charles-

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ton, in South-Carolina, where Mary Creagh died, leaving three infant children, the present appellants. Don Diego Murphy afterwards married Louise Peyre, the present defendant. In their contract of marriage a community of goods is also stipulated, and a clause is introduced, whereby Don Diego Murphy binds himself to fulfil the necessary formalities to put an end to the community, which he acknowledges has continued to subsist between him and his children of the first marriage. It appears by oral testimony that, shortly after this second contract had been celebrated, he caused an inventory of his estate to be made, the legality of which is disputed.

The first and most important question which presents itself here is, whether the community which existed between Don Diego Murphy and his first wife did really continue after her death between him and his children.

The better to understand the principle on which turns the decision of this point, we shall first consider what would have been the situation of Don Diego Murphy and his first wife, if they had married without any contract. It has already been made a question in this court in the case of *Gale* vs. *Davis's heirs*, 4 *Martin*, 645, whether the law of the place where a mar-

riage is celebrated is to follow the married couple wherever they go, and to regulate their respective interest every where; and it was decided upon the authorities there cited, that "when a married couple emigrate from the country where their marriage took place, into another, the laws of which are different, the property which they acquire in the place where they have moved, is governed by the laws of that place." Hence, if Don Diego Murphy and his first wife had married, without contract, at Cape Francois, and afterwards transferred their *domicil* to Charleston, we would have no hesitation to say, that the community would have ceased from the moment of their arrival at Charleston; and that the property thereafter acquired would have belonged to the husband alone.

But the parties had entered into a contract by which it was stipulated, that there should be between them, a community of goods, to be regulated by the custom of Paris, wherever they should go. That contract was their law; and provided it was not to cause any prejudice to the citizens of the country where they went to reside, and its execution was not incompatible with the laws of that country, it was to be maintained. By virtue of that contract therefore, the community of goods stipulated by the parties, subsist-

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ed at Charleston, until the death of the wife. Did it survive her, and continue to have effect, between the husband and his children?

To put this question in a clear point of view, we must distinguish between the rights which derive from the contract of marriage, in favor of the heirs of the wife, and the rights which are granted by law to the heirs of either party.—The rights which derive from the contract, are those of accepting or refusing the community, as it stood at the dissolution of the marriage, and in case of renunciation to retake all the property of the wife free from debts. The right granted by law to the heirs of either the wife or the husband, is that of continuing to be in partnership with the survivor, if they please, in case he or she should neglect to make an inventory of the property left at the death of his or her partner. This right, so far from being the consequence of a contract, is given by the custom of Paris to the children, whether there be a contract or not. Let us apply this distinction to the present case. Murphy and his first wife, by virtue of their contract of marriage, continued to be in community of goods, even after their removal to a country where a different law prevailed: that stipulated partnership between them lasted as long as their marriage; upon the dissolu-

tion of the marriage there was an end to the community by contract. What could make that community continue between her children and their father? The law. But that law does not prevail in the country which the parties then inhabited. The forcible consequence is that the community did not survive the mother of the appellants.

The belief which Don Diego Murphy and his second wife, the defendant, seem to have entertained that the community was continuing between him and his children at the time of their marriage, does not alter the situation of the case. If under that belief they had done some act, if, for example, they had allowed to the plaintiffs more than they were entitled to, perhaps they could not even recover it back, according to the maxim that no relief is granted against an error of law. But here things are entire. The mere expression of their belief cannot be deemed of any account.

The situation in which the community stood, at the time of Mary Creagh's death, is left in the dark, the plaintiffs having made no effort to adduce any evidence on the subject. From the testimony produced by the defendant, it appears that, at the epoch of her marriage, Don Diego Murphy possessed no real estate, and hardly

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personal estate enough to pay to his children the dowry of their mother. We must take the evidence as it is, and conclude that the community between him and Mary Creagh, had made no gains.

The claim of the appellants, must therefore be reduced to the dowry, or marriage portion of their mother, and their share in their father's succession, which is to be composed of his half of the property, inventoried and collected, according to the account rendered by his testamentary executors; deduction being first made of the marriage portion of Mary Creagh, and of the marriage portion, *douaire et preciput* of the defendant.

A difficulty has occurred, as to the manner of calculating the marriage portion of Mary Creagh. It is called ten thousand livres, and the appellants contend, that these are *livres tournois* of the currency of France, the mother kingdom of the then colony of St. Domingo, where the contract was celebrated. We are however satisfied from what has been shewn to the court, that the livres must be understood according to the St. Domingo currency.

Upon the whole, we have found nothing to redress in the judgment appealed from.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Rodriguez for the plaintiffs, *Moreau* for the defendants.

RUST vs. *RANDOLPH.*

If before the appointment, one of the applicants for the curatorship of a vacant estate, receives his debt, he thereby destroys his claim as a creditor.

A person not repelled by the law, from the curatorship, cannot be excluded on suspicion of his intention to abuse the trust.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. The parties contend for the curatorship of the vacant estate of Solomon Sterns, who died intestate. The suit originated in the court of probates, of the parish of Orleans, where Rust, the first applicant, and present appellant prevailed. Randolph appealed to the district court, upon which the cause came up to this court, and was here heard, on a bill of exceptions to the opinion of the district court, in refusing to hear testimony, as on a trial *de novo*, 4 *Martin*, 370. The cause (having been remanded with directions to the judge, to permit Randolph, the then appellant, to prove certain facts, tending to shew that he was entitled to a preference over Rust) has since been heard on the merit, and the curatorship was decreed to Randolph.

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From this judgment, Rust appealed.

When the case was first before us, we declared it to be our opinion, that in a contest for the curatorship of a vacant estate, between a citizen of the state, having property in it, and a person having neither domicil nor property therein; if the claims of the parties, as authorised by law, are in other respects nearly equal, the former ought to be preferred: his property affording an additional security for the faithful discharge of his trust, as it is by law tacitly bound therefor.

The pretentions of the present suitors, to the curatorship of the estate of the deceased, were originally founded, on credits so inconsiderable, in proportion to the value of the estate, and so little different in their amount or nature, that they may fairly be classed among those small matters, not legally worthy of notice, as *de minimis non curat lex.*

In this view of the subject, Randolph, the present appellee, is clearly entitled to the preference given him by the judgment of the district court; but, we are of opinion that, by accepting the payment of his claim against the estate of the intestate from Rust, the present appellant, he destroyed his right to the curatorship. He is now no longer a creditor, nor was

he, at the time the judgment appealed from was given by the district court. The latter is the period to which we are to look, in pronouncing upon his claim.

On the appeal from the court of probates, a trial *de novo* was had in the district court; and we are not bound to consider the situation of the parties at the time of the judgment in the first court.

According to our law, in the appointment of the curator of a vacant estate, creditors are to be preferred to strangers and persons not interested in the estate. *Civ. Code, 176, art.* 132. Now, Randolph was not a creditor, when judgment was given for him in the court below, and he had no longer a right of contending for the curatorship of the estate, being, in the words of the code, *a stranger, and a person not interested in the estate.* Yet, it is contended by his counsel, that, admitting that he has no claim to the curatorship of the estate, as a creditor of the intestate, the appellant, Rust, ought not to be trusted therewith, because it appears, from the evidence in the cause, that his views with regard to the property are dishonest—that the motives which influenced him to solicit the curatorship are unjust and corrupt; his object being to obtain possession of the estate, and to make it his own, by cheating the heirs.

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The testimony shews clearly that Rust expressed a wish to obtain the property from the heirs, at a price far below its value; but there is no express proof of an intention on his part to effect the purchase by means absolutely unfair. He seems to have relied more on their ignorance and poverty, and great the distance at which the property is placed from them.

The rule of law, on the subject of the exclusion from the appointment of a tutor or curator, as it relates to the moral character of an applicant, extends only to those whom the law declares infamous. On the ground of general character, perhaps none ought to be rejected, except those who come within this definition. If the person applying be not a citizen of the state, and has no property in it; if he be of a bad character and low standing in society, &c. these are circumstances which ought to influence the judge in requiring better security.

We are of opinion that the district court erred in giving judgment for the appellee.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the appellant be placed in his situation of curator, as it existed before the appeal from the court of probates.

Livingston for the appellant, *Smith* for the appellee.

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The previous laws of this state, as are not contrary to the civil code, are not repealed thereby.

The law of *Recopilacion* requiring as a legal presumption of a child's capacity to live, that he should live twenty-four hours, is still in force.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff's son died, leaving his wife, the defendant, in a state of pregnancy.—Some weeks after, she was delivered of a child, who lived a few hours and died. The question is; did this child inherit?

Notwithstanding the shocking contradictions which fill the depositions, given at different times by the same witnesses, it may be considered as proved, that the child was born after the period, posterior to which children are deemed capable of living, that he was born alive, without any apparent defect of conformation, and that he lived seven or eight hours.

There is, therefore no doubt, that according to the Roman law, and to the laws of many modern nations, this child would be deemed capable of inheriting.

In Spain, however, the laws of which were, and have continued to be ours, where not repealed, there exists a particular disposition, by which it is further required, that the child, in or-

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der to be considered as naturally born, and not abortive, should live twenty-four hours. Is that law still in force among us, or is it virtually repealed by the expressions used in our civil code, in relation to this subject?

Of the different articles, in which our code has occasion to touch upon, two may be selected as bearing more directly upon the question before us. The first is the definition of what is an abortive child: the second is that which declares, that the child born incapable of living, is incapable of inheriting.

"Abortive children, according to that definition, are such as by an untimely birth, are either born dead, or incapable of living." No such thing is required here, as their living twenty-four hours. Hence it is argued that the Spanish law, which made that circumstance necessary, is impliedly repealed. *Civ. Code* 8, *art.* 6.

It must not be lost sight of, that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.

Is the definition given of abortive children in the code, incompatible with the disposition of the law 2, *tit.* 8, *book* 5, of the *Recopilacion de Castilla*, which declares that those will be deemed abortive, who shall not live twenty-four hours? We think not. The definition given in the code, must hold as good in Spain as any where else, for it is dictated by nature itself: "the abortive child is that, which from an untimely birth, is born incapable of living."—But how shall that be ascertained? The law above cited says that, to remove doubts on the subject, the child shall be reputed abortive, if he has not lived twenty-four hours.—So our civil code provides that, in order to inherit, the child must be born capable of living *(viable;)* and the *Recopilacion de Castilla*, requires a legal presumption, that he was capable of living—that he shall have lived twenty-four hours.

Again, it is said that living twenty-four hours is no proof of the capacity to live; for that children, after an untimely birth, will sometimes live several days and more.—That is very true. But as the time of conception is uncertain, and great doubts must often exist, as to the length of gestation, when a child is brought into the world, a general rule is provided, by which the capability of the child to live, is so far tested.

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At the same time, where, from the recentness of the marriage, or the absence of the husband, it can be ascertained, that the child was born before the epoch, after which he may live, he is declared abortive, though he should have lived twenty-four hours. This law might certainly be known to be founded on very good reasons. But we are not here deliberating on its adoption. Wise or absurd, it exists, and must be obeyed.

It has been observed, that living twenty-four hours cannot be deemed required, as a proof of the capability to live, for that baptism is also made a requisite, without which the child is reputed abortive, a circumstance which has surely nothing to do with the constitution of the infant. We do not see the necessity of the conclusion. Baptism is required from motives of religion, totally unconnected with the reasons which may have induced the legislator, to establish the other condition.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, be reversed; and that judgment be entered in favor of the plaintiff, for two-thirds of the neat amount of the estate of his deceased son.

Livingston, on a motion for a rehearing. By the reasons alledged, for the decree of reversal in this cause, it is admitted, "that the child was born after the period posterior to which, children are deemed capable of living, that he was born alive, without any apparent defect of conformation, and that he lived seven or eight hours;" and the cause is decided simply on the ground, that the law of the *Recopilacion*, 8, 2, is in force in this state.

It is proposed respectfully to controvert this position.

It is true, that the civil code of this state, purports to be a digest of the civil laws previously in force—but it is also to be observed, that even in the title, (from whence this definition is drawn) it is added, "with alterations and amendments, adapted to the present system of government." And in the law of the 31 *March*, 1808, promulgating that code, this title is recited *verbatim*, the code is declared to be in force in the territory, and it is ordered to have "full execution," and the 2d. section repeals all former laws inconsistent with it.

The law, thus declared and ordered to be carried into full execution, contains two provisions only, applicable to this discussion.

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I. The first, which defines abortive children, to be such as by an untimely birth, are either born dead, or incapable of living. What was the definition of an abortive child, by the pre-existing law? Was it the same given by the code, or different? And in the latter case, which definition must the court adopt? The pre-existent definition, is contained in the law above referred to, 5 *Rec.* 8, 2. Like the code, it purports to give a definition.

"To avoid doubts on the question, whether a child is abortive or naturally born," it proceeds to define, that those children shall be considered as abortive, who are not born entirely alive, who do not live 24 hours, and who were not baptised. By comparing these definitions, it will be found, that of the three requisites contained in the Spanish law, not one is contained in the code. But that this latter requires three things, totally distinct from the former, to constitute abortion: 1 being born dead: 2 being born incapable of living: 3 that the death or incapacity to live, are the effects of an untimely birth. But not one word of the "*todo vivo*" of the twenty-four hours, or the baptism. The definitions of an abortive child, as drawn from the spanish law, and from our code, are not the same. Which are we to adopt?

There can be but one answer to this; we must adopt the last: but can we superadd the former? Can we ask as well the requisites of the definition, in the law of the *Recopilacion* as those demanded by the code? I think not.

A definition is *ex vi termini* an exclusion of every thing not expressed. The law therefore which defines a right; a crime, or incapacity, excludes every thing, not contained in the definition, as completely as if it had used regular words, and said, that nothing should confer the right, incur the guilt of the crime, or make one subject to the incapacity, but the circumstances contained in the definition. A posterior act therefore giving a different definition, from the pre-existent law, necessarily repeals it. Let us exemplify each of these.

1. A right. Suppose by the laws of a state, defining the right to vote, it should be declared that, "every free white man, who had lived twenty-four months in the country, should have this right," and that by a subsequent law, purporting to have the same object, it should be enacted—that voters shall be "such free persons as live in the country." Omitting the word white, and saying nothing of the term of residence. Can there be a doubt, that in such case, the man of colour, who had gained a residence

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by being domiciliated for twelve months, would have the right to vote?

2. The definition of a crime. Suppose by the present laws, that arson shall be defined. "The wilful burning of a dwelling house, which had been inhabited within twenty-four hours previous to the fact, or the burning as aforesaid of any barn or cotton gin."—And that an act should afterwards pass, purporting to be a digest of the penal code now in force, with alterations and amendments, in which arson should be described to be the "wilful burning of a dwelling house or barn," can there be a doubt, that a person under this act, would be guilty, if he were to burn a dwelling house, although it had not been inhabited for twenty-four hours, and would not be guilty, if he were to burn a cotton gin.

3. A disability. Suppose the law under the head of "those who are incapable of making wills" should be, that those only are incapable, who are not 20 years of age, and are not emancipated, and that a subsequent law should say, "those alone are incapable of making a will, who are under 20, without saying any thing of emancipation. In this case, who would say that the emancipated minor, between 20 and

it, could make a will under the first law, or could not under the second.

In all these cases, then we find that the subsequent legislative definition, corrects the former; and if the reasoning be good, we must conclude that the laws in which an abortive child is defined, must be taken from our civil code, not from the laws of the *Recopilacion*.

II. The second provision in the code, and the one most applicable to our argument, is *page* 150, *art.* 64 and 65.

Our question is, whether a child born alive, within the legal period, and without any defect of conformation (I state the facts as agreed to by the court) be capable of inheriting. Let us consult our text. The chapter treats "of the incapacity or unworthiness of the heirs" and the title is "of successions" and the work itself is a "Digest of the laws in force, with alteration and amendments" whatever general rules are laid down there, on the subject, must exclude every former provision, inconsistent with the chapter. It proceeds to give us those rules.

The first, *art.* 64, we may suppose to be an answer to the question—Who have the capacity to inherit? The response is clear and explicit. All free persons, with the single excep-

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tion, of the child who is born not capable of living. I say the single exception, for the other of the "child not conceived" is one only in terms, because the "child not conceived" at the death of the father, is not his child, and therefore, not coming within the rule, cannot be made an exception.

Then follow the answers to the other question, who are unworthy to inherit? With which we have nothing to do, except for illustration.

Here then, is a general rule laid down, in a digest which was intended, (according to the preamble to the law of 1808) to make known the laws which have been preserved after the abrogation of those &c. "and to collect them in a single work, which might serve as a guide for the decision of the courts and juries"—and which the same law declares "shall have complete execution."

This rule declares that, "all free persons are capable of inheriting, who are born capable of living." If we ask something else, to complete this capacity, whether that something else existed in a former law or not, do we not add another exception, to the only one contained in the rule, and what else is this, but altering the law, or in other words, acting contrary to it.

If we say, that a free person born capable of

living, shall not inherit, because he died twenty-three hours after he was born: is it not most clear, that we break the rule which says, that all free persons capable of living, have the capacity to inherit?

The law of the *Recopilacion*, establishes one rule on this subject, the code establishes another. The one requires more, the other requires less. If to inherit under the first, three be required; and under the second, only one; is it not mathematically demonstrable, that you cannot give effect to the last law, if you insist on the requisites demanded by the first; and if you do not give effect to a law, do you not break it?

These principles may, I think, receive some illustration from that part of the same chapter, which relates to unworthiness to inherit.

By the Spanish law, *Part.* 6, 3, 4, a person banished; one condemned to the mines, (leaving apostates and heretics out of the question) a person born of an incestuous connexion, were deemed unworthy to inherit, as instituted heirs, and by *Part.* 6, 7, 13, six other causes of unworthiness to succeed, are enumerated. Of all these, our code contains but three, and those all different in form, some in substance, from any of the causes of unworthiness contained in the *Partidas*. Now would it not be somewhat like

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a solecism to say, that the law which prescribes nine cases of unworthiness, is consistent with the law which says, there shall be only three? Would not this construction lead to the evil of recurring to a multiplicity of books, which being for the most part, written in foreign languages, offer in their interpretation inexhaustible sources of litigation?" How far this evil would extend, it is difficult to foresee, if the general rules laid down by the code, are not to exclude the former provisions on the same subjects, in the existent law.

If these general rules do exclude them, the question is at an end; because the living twenty-four hours, is not given by the *Recopilation* as a definition or explanation of the word *viable*, or the phrase, capable of living, but as a new and distinct condition of succeeding, and an explanation of what shall be deemed an abortive birth, of both of which, we find our law has given other conditions, and different explanations.

The court, MARTIN J. dissenting, denied the rehearing.

Livingston and *Mazureau* for the plaintiff, [illegible] for the defendant.

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M'BRIDE vs. D. & N. CROCHERON.

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A creditor who has given a respite, may sue before the expiration of it, if the debtor becomes insolvent.

APPEAL from the court of the first district.

In the month of February, 1816, the defendants contracted a debt with the plaintiff, (all merchants of New-York) to the amount of about twelve hundred dollars, for which the latter received their promissory notes, payable at a future day. Before, however, those notes became due, the defendants represented themselves in embarrassed circumstances, and obtained from the plaintiff and their other principal creditors, a letter of license, dated 19th June, 1816, to enable them to continue in business; each creditor giving in extension of the terms of payment, six, nine and twelve months. Accordingly, on the 14th of September, 1816, the plaintiff renewed those notes, which were then actually due, enlarging the credit, as just mentioned. But, a few days after their renewal, the defendants stopped payment, and altogether failed in business; and on the 26th of September, 1816, assigned their estate to J. E. Haight, D. L. Haight, H. E. Haight, and E. Potter, junior.

The letter of license sets forth the embarrassment of the defendants; that if their pay-

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ments are extended, they will be able to continue in business, and promptly pay their debts. It then stipulates, that if any creditor shall sue the defendants, or attach their property, "contrary to the true intent and meaning" of that instrument, such creditor shall forever lose his debt.

The assignment arranges the creditors in four distinct classes, making it the duty of the assignees to pay them in that order. The assignees are of the first class—the plaintiff is one of the fourth and last class of creditors, and to which the property of the assignors will not reach. After the above mentioned extension of credit, and shortly before the making of the assignment, the defendants shipped goods to the value of fourteen or fifteen thousand dollars, to New-Orleans, on their own account, consigned to Flower and Findley, the garnishees in this action.

The plaintiff, not choosing to come in under the terms of the assignment, which he was regularly notified to do by the assignees, followed the goods here; and on the 13th of November, 1816, attached them in the hands of the garnishees, for the whole amount of his debt—at which time, however, the renewed notes were not payable, although the terms of credit spe-

cified in all the old notes, which were so renewed, had, for some time, expired.

The district court sustained the attachment, and gave judgment for the plaintiff for twelve hundred and nineteen dollars, sixty-two cents, the amount of the renewed notes; and the defendants appealed.

Duncan, for the defendants. This attachment was brought in violation of the agreement entered into by M'Bride, in the letter of license. We will endeavor to shew, that the assignment by the Crocherons did not destroy the letter of license, and that, therefore, the agreement of M'Bride is still in force. The counsel adduced, in the lower court, many cases to prove that, because one of the contracting parties is unable to fulfil his part of the agreement, the other is, to all intents and purposes, discharged. Admitting, for argument's sake, that all these authorities are law, we contend they are not in the least applicable to our case. In those cases the party was completely and absolutely unable to perform his part of the contract—in our case it was not known whether the debtors could or not. This is the grand distinction, and which we submit with confidence to the court. At the time of this attachment being issued, it was im-

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possible to say whether the Crocherons could pay their debts or not. The notes were not to be finally paid until twelve months had elapsed from September. In November this attachment was laid—after an interval of only two months. At that short period of time, it was impossible to determine whether there was such a disability on the part of the Crocherons as to exonerate M'Bride from his engagement under the letter of licence. To this day, this question cannot be settled; for not quite nine months have expired. But, in answer to this, we will be told that, though it was not certain at the time of the attachment whether these debtors could perform their contract; yet they made an assignment, which is proof of their insolvency. We deny that this is an infallible proof. We admit that a presumption of insolvency arises against the debtor; yet, on the other hand, with confidence we can assert, that a man may be declared insolvent, or a bankrupt, and yet, under all circumstances, not be one: for, at the time of being declared an insolvent or bankrupt, under a law, the debtor may be so situated as not to have his property under his controul. It may be in different parts of the world, shipped on mercantile adventures. He is then obliged to have his situation known, and undergo a tem-

porary bankruptcy. This certainly will not appear to the court; a strange and unauthorized doctrine. Lord Mansfield declared in *Rex* vs. *Town of Liverpool*, 1 *Burrow's* 732—"That a man may be able to pay above 20 shillings, notwithstanding his being in strictness a bankrupt."—That great man advanced a similar assertion in *Dassel* vs. *Simpson*, *Dougl.* 92—"a man may become a bankrupt, and yet be able to pay 25 shillings in the pound." On these authorities, and on the principle of the thing, we say, that because a man may make an assignment of his property, he is not to be considered as absolutely unable to execute his part of a contract. Our case is still stronger. We are not declared insolvent under any law; we made a voluntary transfer of our property, for the benefit of our creditors. It is a mere arrangement between ourselves and creditors, to relieve us from the many embarrassments in which we were involved: it is altogether a contract. We confidently say, that no case can be produced, which goes so far as to declare a man absolutely incompetent of fulfilling his engagements, because he assigns his property over to his creditors. On the contrary, we assert it to be but an arrangement, for the benefit of the debtor, to enable him to discharge his debts, at a more auspicious time. It

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is made to assist us in our embarrassments, without exonerating him in the least from his engagements, unless the creditors have released the debtor altogether. We consequently say, that this assignment did not prove, that the Crocherons were in such reduced circumstances, as to render them wholly unable to satisfy their creditors; and that therefore, our position will not be affected by it, when we said that this attachment was brought without knowing, that the Crocherons could liquidate their debts.

"If a contract be fair in its creation, it shall not be affected by a subsequent event, which has thrown the advantage greatly or wholly on one side," is a position which has been most strenuously, and ably held by the most learned judges of England. In 1 *Brown Chanc. Rep.* 157, *Mortenier* vs. *Capper*, to the utmost extent, this principle of law is recognized. "Sale of an estate for a certain sum of money, and an annuity for life. The agreement being fair, a court of equity will decree a specific performance; though the party die before any payment of the annuity." 3 *Brown's Chanc. Rep.* 605, *Jackson* vs. *Lever & al.* presents the same doctrine. "A contract, that the one party shall convey an estate, and the other shall grant an annuity, shall be carried into effect, though the

vendor died previous to any payment of the annuity." 2 *Brown's C. Rep.* 17, *Henley* vs. *Acton*, supports similar principles. To shew that the same doctrine has been held by other judges, we call the attention of the court, to 1 *Atkins*, 12, *Gibson* vs. *Patterson & al.* "Though the vendor of an estate, does not produce his deeds, or tender a conveyance within the time limited by the articles, the court does not regard this neglect, but will decree a sale notwithstanding."—Lord Macclesfield has said in 1 *Peere Will.* 728, *Cann* vs. *Cann*, "that solemn conveyances, releases and agreements, made by the parties, are not slightly to be blown off and set aside." In later times—only a few years past, the court of Chancery in England, has most unequivocally upheld a similar position. More particularly we refer this court, to 6 *Vezey Jr.* 340 *Paine* vs. *Miller*, and 9 *Vezey Jr.* 346.—These authorities, go to the full lengths, which we stated in the commencement; that a fair contract shall not be overturned by a subsequent event, which has given the one of the parties, even all the advantage. Apply this principle to our case, and it will be immediately seen, that the subsequent assignment by the Crocherons, did not destroy the letter of license. The letter of license, was an instrument of wri-

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ting under hand and seal—entered in the most solemn manner, between the creditors and the debtor. To set aside such an instrument, says Lord Macclesfield, is not to be easily done. It grants to the Crocherons, an extension of time, to enable them to discharge their debts. It contains the important proviso, that no creditor shall sue for his debt, under the penalty of losing it. This was then, a fair contract, for the advantage of each party. It in course of time, turns out that the Crocherons become too embarrassed, to proceed in business; and they make an assignment of their property, for the benefit of their creditors. Now here the advantage of the contract is not wholly on the part of the debtors; nor is it in strictness greatly so. They give up their property, and expect no benefit from it. But they ask from the creditors, the execution of their part of the agreement. Now will not this case be brought completely within the spirit, even the very letters of the authorities, we have quoted in our favor? Shall this "subsequent event" overturn this contract, fair in its creation, even when the advantage is not wholly on the side of the Crocherons? We ask the court, if these cases will not completely bear us out, in saying that the letter of license is still

in operation; and that consequently, M'Bride is bound by his own agreement?

But on the reason of the thing, why should the assignment overturn the letter of license? M'Bride, and the other creditors, must have known all the risks which they would have to run, in granting an extension of credit. Many accidents and misfortunes might happen, before the twelve months could have expired. Of this M'Bride must have been aware: yet he signs the instrument. In the letter of license, nothing is hinted about its revocation, in case of an assignment of property. M'Bride could not have supposed, that the law would authorize him to say that it was, when that law is undetermined. Every danger which a man in business could encounter, must have been in the mind of M'Bride, at the execution of this instrument. The Crocherons could not guarantee their solvency—this the creditors could not exact of them; for it would be in the highest degree unreasonable. But they would do every thing which could be done, to extricate themselves from their difficulties—all that industry and honesty could effect, would be performed by the Crocherons. If they must sink beneath their embarrassments, it was a misfortune which they must encounter. But if any injury could

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arise, it must be sustained by their creditors.—They had all these in consideration, when giving the letter of license. These dangers and these accidents have occurred; and upon them the loss, if any, must be thrown.

Our first point was, that this attachment was issued in violation of the agreement of M'Bride. This difficulty will attack the counsel in the commencement of their agreement. How to prove that a man can break his contract when he pleases, and thus render his engagements a nullity, requires all their learning and ingenuity. But the assignment is pleaded in bar. To this M'Bride is a perfect stranger. He disdainfully refused to accede to its laws. He alone wishes to overturn it. M'Bride alone steps forward; tenders in bar of the execution of his solemn agreement, an instrument with which he never had any thing to do—but which was an arrangement with other creditors, to his entire exclusion. To assit him in breach of duty—to support him in a most unwarrantable claim, he asks the interference of this court.

A question may be started respecting the validity of the assignment of the Crocherons. The decision of this is not necessarily involved in the main question. We are not afraid to meet it: and will endeavor to shew that it is

perfectly good. Many cases have decided, in direct contradiction to our opponent, that a man may, even in insolvent circumstances, give a preference to his creditors. We deny that the Crocherons were completely insolvent. But, admitting they were, we will exhibit to the court three cases which authorized them to make an assignment, granting a preference. In *Small vs. Oudley*, 2 *Peere Will.* 430; the court there held, that a debtor may prefer one creditor to another; nor is the time when the assignment is made material. This is the basis of all the decisions on that subject. In 8 *Term Rep.* 528, Lord Kenyon says that, "putting the bankrupt laws out of the case, a debtor may assign his effects for the benefit of particular creditors." But, what we most rely upon are two cases in this country—one in New-York, and the other in Connecticut. 5 *Johns. Rep.* 412. "A debtor may, in insolvent circumstances, *bona fide*, give a preference to one creditor to the exclusion of others, and such preference, though voluntary, is valid, unless done in contemplation of an act of bankruptcy; and even if an act of bankruptcy be contemplated by the debtor, yet, if at the instance and application of a particular creditor, he pays such creditor, or assigns him property, such payment or assignment will be

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valid, as against the assignees of the bankrupt." This point is strongly laid down in 3 *Day*, 340, *Hempstead* vs. *Starr*. "A, on the eve of failure, made a general assignment of his effects, and gave immediate possession to B, one of his creditors, in trust, to satisfy the debts due to B and certain other meritorious creditors specified, and to pay over the surplus, if there should be any, to the creditors generally. C and D, creditors, not specially named, soon afterwards attached these effects in the hands of B, as the property of A, held that this conveyance was not by law fraudulent against the attachment of creditors." These cases completely nullify the assertion, that a man, in insolvent circumstances, cannot make a preference of his creditors. Now, let us see if this assignment was "wholly bottomed on fraud." Nothing can give a more satisfactory answer to this question than the evidence. Fraud must mean, cheating the creditors: it must be most positively proved, and never, in any case, presumed. Haight, a witness—a man entitled to the utmost credit, whose veracity has not been questioned by our antagonist—indeed his own witness solemnly deposes, that he was informed by the debtors of their intentions to ship these goods to New-Orleans—that they were not to be included in the assignment

—and that the Crocherons declared at the time, the creditors should not lose a cent, even if it took up all the proceeds. Now, this evidence is uncontradicted, and we must therefore believe it. Is there then any thing bearing the appearance of fraud in this? "The creditors should not lose a cent," is the strongest proof of the honesty of these unfortunate men—"even if it took up all the proceeds,"—shews that they expected their shipment to this place would be more than sufficient to discharge their debts—if not, all should go to satisfy their creditors. So anxious were the Crocherons to do themselves and their creditors the fullest justice, that one of them comes to New-Orleans expressly to take care of the property, that every thing which could be, should be done to vend it to the greatest advantage, in order to relieve themselves from their embarrassments. If there is any thing like fraud in this, it must exist in the most religious transaction. But, to rake out fraud, subterfuge must be resorted to. Brewster, the clerk, swears that he never saw any entry of this shipment in the books of the Crocherons. He does not swear there is no entry; but Haight swears most positively there is one. Which will the court believe? And will they believe the assertion of counsel, that this entry

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might have been made just before Haight gave his deposition? Is there any thing through the whole evidence to authorize such an insinuation against Haight? The imagination of our opponent is too rich—it destroys his judgment.—If there is nothing in the least resembling fraud in this transaction—if the law will permit the Crocherons to give a preference—the court will then say this assignment is valid. The opposite side have denied the validity of this assignment. So much the better for us. Then the letter of license is still in complete force. An invalid instrument cannot affect a valid one. M,Bride admits the validity of the letter of license. If so, it cannot in the least be touched by an instrument, void *ab initio*. Which ever way the case is put, the letter of license must be considered by this court as still in operation against M'Bride and the other creditors.

Our second point is this, that this attachment was laid before the debts were due, and, therefore, prematurely brought. It will be recollected, that the notes of the Crocherons were renewed six, nine and twelve months; only two months had expired when M'Bride commenced his action; he sued on the renewed notes, not pretending to have a right of action on the old ones, well knowing how shameful his

conduct would appear in the eyes of the world. We admit the principle of law laid down by our antagonist, that on the debtor's insolvency all his debts are due *in presenti*, though the contract makes them payable *in futuro*. This rule of law is not applicable to our case. Those debts are proved under a commission of bankruptcy, or when the debtor is discharged under an insolvent act. Ours is neither—we make a voluntary assignment—we do not ask to be discharged under any law—we give up our property from our own will, and enter into this arrangement with our creditors, without being compelled by any law whatever. In the former case, the debtor is forced to do what the statute prescribes—he must give up every thing in the order fixed to his creditors—they are also compelled to come in and receive what is parcelled out for them. This is the distinction. In our case every thing is voluntary—no compulsion is or can be used on either side. Under such an assignment, these debts are not *debita in presenti*—because there is no bankruptcy, no insolvency, but an arrangement between the debtor and his creditors. Were it necessary, we could refer the court to our statutes in relation to attachments; and, upon a comparison of the facts as sworn to by the plaintiff, and those ad-

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mitted by him in this appeal, we doubt not that the contradiction evident in the two would destroy the application to uphold their demand in this court.

We do not want the court to notice the "supposed title of the assignees," it was unnecessary for them to defend this action. The Crocherons not the assignees, are the defendants, and therefore the principle stated in *Chitty's Pleading*, 1 *vol.* 505, has nothing to do with our case. This property, it is in evidence, was never to be included in the assignment; but to be left at the disposal of the Crocherons. All the Haights positively swear that this was the understanding of the parties, nor was there in this any thing illegal or morally incorrect. It was to be under the controul of the debtors that they might make sufficient out of it to enable them to liquidate their debts. Neither was it necessary to forward any documents to their consignee in this city. The very act of one of the Crocherons coming with the property superseded the necessity of this. It was under his direction—he was the agent of the house, and he could deliver it to any person in this place whom he thought most entitled to confidence. The delivery of it by him would be a sufficient authority for the agent in this place to sell it and render the pro-

ceeds to the Crocherons. It was not then the apprehension of any fraud—if fraud could possibly exist—being detected, that no papers were transmitted to the garnishees, but the bare simple act of one of the debtors arriving here with it, rendered it wholly useless.

From what has been said, the court will immediately perceive the difference between our case and that reported in 3 *John.* 125, which the plaintiff has brought to his assistance. Here the concealment by the debtor was fraudulent, and nobody knew it but himself. In our case, the evidence will, we trust, satisfy the court that there was no fraud. Our assignees were creditors, and the legal guardians of the property of their debtors. They knew every thing that was done by the Crocherons, relative to the shipment of their goods to New-Orleans. They certainly would have done nothing which could have had a tendency to deprive them, of the payment of their debts. The facts in the two cases are different *tato cælo,* and no inference can be drawn by the court, from that in *Johnson* to the prejudice of ours.

We have thus given the two points, on which we rely for our defence. Many others could have been presented the court. We resist the demand of M'Bride, because we say, that his

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attachment was brought in contravention of a solemn agreement, and before the notes—the foundation of the action, were due. This court will, we have no doubt, well consider the nature and extent of M'Bride's demand. They will in their decision in this suit perceive, that an important principle is involved. We ask for nothing but justice, and we do say, that the demands of the creditor in this case, are not consistent with justice.

Stannard for the plaintiff. The letter of license became inoperative, by the subsequent insolvency of the Crocherons, and the assignment of their estate, and so was no bar to this attachment.

The assignment does not affect the rights of M'Bride, to receive payment out of the property attached.

I. It is a very general rule, that on the debtor's insolvency, all his debts are due presently, although by the contract they are payable in *futuro*. This is an acknowledged principle. Now, the Crocherons became insolvent, and assigned over their estate, in September, 1816, which had the effect of making M'Bride's debt

due at that period. The attachment was issued in November following.

But, again: "according to the true intent and meaning" of the letter of license, the creditors, who had not accepted of the assignment, might well attach. What was that license? To enable the Crocherons to continue in business and pay their debts. Had they done so, the creditor could not have attached: but the moment they became insolvent, and assigned over all their estate, they put it out of their power to pay—they broke the conditions upon which the license was granted to them, and the creditor was no longer bound by it. And what is the legal construction of the license? The Crocherons represent themselves embarrassed. The creditors say to them, "if you will continue in business, and fairly and honestly pay your debts, we will give you further time to pay us." Upon these conditions they received the letter. Now, can it be contended, that they have complied with those conditions? If not, and they are not bound, and cannot be made to comply with their part of the agreement, shall the creditor be compelled to observe his? Was not their insolvency and assignment a complete destruction of their power, and a declaration of their intentions not to comply? Clearly so. In the courts of com-

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mon law, this has been repeatedly so decided; and in 1 *Pothier on ob. p.* 2, *ch.* 3, *art.* 3, *sec.* 3, there is an authority in point. "The term granted by the creditor to his debtor, is founded on a confidence of his solvency—when that foundation fails, the effect of the term ceases;" and goes on to say that, in such case, the debt is immediately due. No principle can be more just as respects all concerned. It is the change of the condition of one of the parties, that releases the other: for when one of the contracting parties has put it out of his power to observe that part of an agreement to which he is bound, it would be extremely hard to compel the other party, to his certain ruin, to perform his. Something of this principle is found in every code of laws—in courts of equity too, it is fully established—as in the case of *Drake* vs. *Mayor of Exeter*, 1 *Chancery Cases*, 71, where the lessor covenanted with his lessee and his assigns, that upon the payment of certain rents quarter-yearly, he would renew the lease. But the lessee became insolvent, and assigned over his property to assignees. The lessor was called on to fulfil his part of the agreement, viz. to renew the lease, but which he refused to do, because the lessee, by his insolvency and the assignment of his estate, had

put it out of his power to fulfil his part of the agreement—that is, to pay the rent: and the court of chancery ruled, that the refusal was properly made; and, as the lessee could not comply with his part of the agreement, would not compel the lessor to renew the lease. This case is certainly very much to the present argument. So in *Willingham* vs. *Joyce*, 3 *Vézey's Chan. Rep.* 168—bill for a specific performance of an agreement to grant a lease to the plaintiff—on evidence of his insolvency, the court would have dismissed the bill with costs, unless the matter had been compromised, on the ground that the plaintiff had put it out of his power to observe his part of the agreement, to pay rent, by becoming insolvent; and so the parties were discharged. And going upon the same reasoning, it has ever been held, in equity, that a failure of the consideration of a contract, by a subsequent contingent event, to which the agreement, from its nature, was subject, is a good reason for not compelling the party not in fault, to comply with his part of it; as in *Stent* vs. *Bailies*, 2 *Peere Williams' Rep.* 217, where the contract was for the sale of shares in the Lustring Company. Afterwards, before the transfer was made, a *scire facias* issued to repeal the patent granted to this company; and,

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at the same time, a proclamation was published, forbidding transfers. The company never afterwards opened their books, nor was there any prospect of their doing so. The seller brought an action on the articles in a court of law, and obtained a verdict; upon which the purchaser filed a bill in equity, for an injunction. *Sir J. Jekyl, master of the rolls.* "It is against natural justice, that any one should pay for a bargain which he cannot have; there ought to be a *quid pro quo*—but, in this case, the defendant has sold the plaintiff a bubble, a moonshine:—and a perpetual injunction was decreed, on the ground that, it being out of the defendant's power to afford the plaintiff that benefit which the contract was intended to secure, the plaintiff should not be compelled to perform his part alone. There was an appeal from this decision; but the lord chancellor confirmed the decree. The case of *Pope* vs. *Roots*, 1 *Bro. P. C.* 370, is also full to the same purpose. There J. S. in perfect health, agreed to sell his estate to B. in consideration of an annuity for life; before the conveyance, however, but after it ought, by agreement, to have been executed, J. S. died. On a bill brought by B. for a specific performance of this agreement, the court dismissed it, because it was impossible for J. S.

(being dead) to have the benefit of the annuity. B. would have nothing to pay, and yet would get the whole estate, which would be unjust; and the court said it was a clear rule, that where one party, by the conduct or misfortunes of the other, could not have the benefit of his part of the agreement, he shall be put in as good a condition as the other, and law and equity will take care that neither party shall suffer by the misfortunes or frauds of the other. Now, it must gratify the court to be able to apply those very just and equitable principles to this case, particularly as it appears that there is only property sufficient to pay the first and second classes of creditors; and M'Bride being one of the fourth, will lose his claim entirely, unless he is paid out of the property attached.

Thus much being advanced in support of the first proposition, before reasons are attempted to prove that the assignment of the Crocherons cannot affect M'Bride in the present action, a preliminary question arises, whether the supposed title of the assignees under the assignment, will be noticed by this court, inasmuch as it is not pleaded, and the assignees are not before this court as parties to the suit? Now, it appears by the affidavits only, that an assignment has been made. By the plea, the letter of

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license alone is relied on, in bar of the attachment. Will this court notice the alleged title of the assignees, inasmuch as they have not pleaded? It is believed not. Matter of defence going to avoid the action, ought to be pleaded. 1 *Chitty on Pleading*, 505. But why? That the opposite party may know to what he is required to answer. Is not the civil law the same? Here the pleadings do not inform the attaching creditor that the assignment will be relied on in defence against the attachment; and his counsel cannot know any thing of it—as between the creditor and the assignee there is no contestation, and the court cannot decide the disputes of persons not regularly litigating in a suit in court. But if the court overrules this objection, which is made only because it may lessen the labors of the court, let us see whether it can make any difference in the ultimate decision of the cause. We are willing to investigate to the utmost stretch of the defence. Then,

II. Good faith is the basis of all mercantile dealings—but it is due to the character of this transaction to say, that it was bottomed in fraud, fraudulent from beginning to end. And what effect does fraud produce? It vitiates all con-

tracts, all proceedings—it destroys the most solemn judgment of a court of competent jurisdiction. The *Dutchess of Kingston's case*, *Hale's Hist. of the Com. Law*, 39, *note* 31.

We must look to the character of this assignment, which we are now supposing duly pleaded; for it is admitted, that if it was a *bona fide* transfer of the property attached, the attachment ought to be dismissed. The rule undeniably is, that where personal property is assigned in a sister state, or elsewhere, according to the laws of the place where the transfer is made, a creditor cannot afterwards attach that property. The rule with respect to real property is directly opposite; but we have no concern with that.

Now, whether the assignment be good or not, as affecting the claims of creditors, will depend principally on the laws of New-York, and the motives of the party making the deed.

A recurrence to the evidence is necessary. Fraud is discoverable throughout.

The assignment purports to convey all the personal estate of the Crocherons. They do not say in the body of that instrument, that any thing is reserved. The creditors too are to be paid according to the good will and pleasure of the Crocherons. Who are they who endeavor to destroy the rights of others, the rights of their

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own creditors, all of whom have equal rights. But they presume to say, unless there is property more than enough to pay the first class (most favored) the second shall have nothing—and so on. The evidence shews that there is barely enough to pay the first and second classes. Have insolvents, even honest insolvents, a right to make this discrimination? A debtor may, to be sure, in the ordinary course of trade, when solvent, and not in contemplation of bankruptcy, pay one creditor in preference to another; but in no other situation—never has he that right in contemplation of, or after insolvency. Here the Crocherons completely failed, and then assigned their property to some creditors, in preference, and to the exclusion of others. Will the law uphold such a conveyance? "It never entered into the mind of a judge to say, that a man in contemplation of bankruptcy, and more especially after complete insolvency, could sit down and dispose of his goods to particular creditors." *Lord Mansfield.* Thus, in the case of *Ogden & Thomas, assignees of Cummings* vs. *Jackson*, 1 *Johns. N. York Rep.* 373–8: Cummings, having become insolvent, assigned to Jackson, a creditor, certain goods in payment of his debt. The assignees, however, afterwards brought this action

of troyer, to get back the goods. The court gave judgment for the plaintiffs, on the ground of fraud, against the other creditors, saying that "it would not be permitted that a person insolvent at the time, should parcel out his estate to such creditors as he may see fit to prefer." And the court added, that to do so, was contrary to the genius of the law, which required an equal distribution. A great number of cases have been decided in other states, and in England, where the common and bankrupt law obtained, analogous to the laws of New-York. It is thought sufficient to notice one or two leading cases on the subject, decided in Great-Britain. *Harman* vs. *Fisher*, 1 *Cowper's Rep.* 126, is one of them. There the question was, whether an insolvent might lawfully give preference to some of his creditors? and it was held by the whole court, that a person in insolvent circumstances, or absolutely insolvent, could not do so; that it could only be done in the ordinary course of business, where the party was solvent at the time, or thought himself so, and not in contemplation of bankruptcy. "What," said Lord Mansfield, "is the nature of the transaction upon the face of it?—it is in terms, that he, (the insolvent) means to give a preference. This the law does not allow." So in the case

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of *Linton, assignee of a bankrupt*, vs. *Bartlet*, 3 *Wilson*, 47–8. The bankrupt, being in insolvent circumstances, assigned over his estate in preference to some of his creditors. This was held to be fraudulent and void—"that it was partial and unjust to all the other creditors"—and the court declared the assignment void. And, again, in the case of *Rust, assignee, &c.* vs. *Cooper*, 2 *Cowper*, 635. This is cited particularly, because the object and motives of the party making the assignment, were very similar to those of the Crocherons. The bankrupt had made an assignment to his creditors; but so that a part of them only could take any benefit under the assignment. He was insolvent at the time. The court looked into the motives of the insolvent, and said—"In the present case there is not a single thing but what is a step towards fraud, and a proof of an intended preference; and to support it, would be to overturn the whole system of the bankrupt laws. The present, therefore, is a fraudulent assignment upon all the other creditors, and all the laws concerning bankrupts." Let the learned counsel say, how this case and the one before the court differ.

But, in truth, what are the pretensions for shutting M'Bride forever out of payment? Is it the honorable conduct of the Crocherons and

the Haights, their assignees? Let us see. The whole transaction shews that the object was to defraud the creditors out of the goods shipped to New-Orleans. It was never intended that they, or the assignees, should have any control over those goods. It was never intended that the general creditors should have any of the avails of that very heavy shipment. Every thing was transacted in the dark. Three Haights are made assignees, adding Potter, a very correct young man, by way of giving false colors to the business. He was to be made the dupe. These conscientious Haights all swear that the goods in question were not intended to be included in the assignment, but that the Crocherons intended to keep them under their own control—and one of the Haights confesses that he was promised payment out of the proceeds. But Potter, and all the other creditors, supposed that the assignment covered all the property of the insolvents. Now, was there ever a more gross fraud? The combination is too apparent to be passed unnoticed. "Make us your assignees; and, that your creditors may be satisfied, and suppose all is fair and honest, let the assignment appear to convey all your property; but you must keep the shipment to New-Orleans a perfect secret, and pay us out of the proceeds

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—then the surplus you may have; but take care that the creditors know nothing of it." Accordingly, no entry whatever was made in the books of the Crocherons of this very heavy shipment—all is done behind the backs of the creditors—even their confidential clerk, their book-keeper, (Brewster) who did their business was kept ignorant of this meritorious transaction. What does he swear? "He never made, or saw any entry made, of the shipment to New Orleans." This is not counteracted by the evidence of one of the Haights, who swears that the books are in his possession, and that "there is an entry." Very true—it was easy to have the entry made but a moment before he took the oath—so he says, there "is" an entry: but the artifice is too shallow to impose upon this court. This is not all—the insurance offices of New York refused to insure. Why? Because they dare not write to the offices for insurance. This would be making the matter too public—and no bill of lading could be shewn, as the goods were shipped in such private silence that the captain of the vessel must not be trusted with the secret, and so was not required to sign bills of lading. One of the Haights acknowledges that he cautioned the Crocherons, that the creditors would find it out—*i. e.* find out the ship-

sent to New-Orleans: and it turns out in evidence, that some of the goods of the Haights accompanied this very shipment, and were embarked in the same enterprize. As they could not trust to the captain to sign bills of lading, they could send no document here to the garnishees to present to the captain on his arrival, to get possession of the goods; therefore it was found necessary to despatch one of the Crocheron's with the goods on board.

Now, we think it does appear, that a more fraudulent, a more corrupt transaction never came before a court of justice—and will this court suffer the parties guilty of those frauds to take advantage of them to the injury of a *bona fide* creditor, who has parted with his goods in faith of the honesty of the purchasers, but who have combined to deceive him? Shall they be suffered to pocket fourteen or fifteen thousand dollars? The assignment purports to convey all their goods. Thus their creditors were to be quizzed out of this very considerable sum—to get without a farthing. But this concealment operates very differently from what they contemplated. It is a fraud—and as to their creditors, makes the assignment absolutely void—as in the case of *Duncan* vs. *Dubois*, 3 *Johns. New-York Cases*, 125-6-7, where the insolvent

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kept back from the knowledge of his creditors a claim which he had on the United States for revolutionary services. It was held fraudulent, and the assignment and discharge of the insolvent void, because "it was a fraud upon the creditors to withhold that claim, so that he might afterwards appropriate the result of it to his own use."

Then it is submitted, that the subsequent insolvency and assignment of the Crocherons did away the letter of license, and restored the claims of M'Bride as they would have been, had that instrument not been made and his notes renewed—that supposing the court will recognize the claims of the assignees, the assignment under which they can alone claim, (supposing it to include the goods in question) is fraudulent and void—that if it did not convey those goods, it was a fraudulent concealment—and that makes the assignment void: and, what is very material in the latter case, these goods remained the property of the Crocherons, and of course subject to this attachment. But, if it be said that the goods in question were conveyed by the assignment to the assignees, a further answer is, that the subsequent possession and control of the Crocherons, independent of other frauds, makes the deed absolutely void as against cre-

ditors. The case of *Mace* vs. *Cadel*, 1 *Cowper's Rep.* 233, went upon this ground, and decided that, if a man convey his goods to a third person, yet keeps the possession or control, it is void, as being fraudulent, according to the doctrine in *Twine's case*, 3 *Coke*, 81.

We might here rest the case; but the counsel for the defendants having taken some different positions from those on which we have discussed the merits of this controversy, it is fit to notice them.

It is admitted, that if the property assigned by the Crocherons is insufficient to pay all their debts, that then the letter of license is destroyed by the assignment—and the force of the authorities proving that position, is not questioned. But, it is said, that this case may be distinguished from that class of cases—and how? Because, say the counsel, "in those cases the party was unable to perform his part of the contract; but that, in the case at bar, it is not known whether or not the property assigned by the Crocherons is sufficient to pay all their debts." That the law is as admitted and proved from authority, there is no doubt; but the gentleman is mistaken in point of fact. The court will see from the testimony, that three witnesses expressly swear, that there is not property more than suf-

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ficient to pay the first and second classes of creditors—and there are no less than four classes, and M'Bride is one of the fourth. How, then, could it be said, that it does not appear that the estate will not pay all the debts of the Crocherons? The evidence was not recollected: If M'Bride does not get payment here, of course he never can hope for it.

Then authorities are cited which, it is said, prove that, "if a contract be fair in its creation, it shall not be affected by a subsequent event, which has thrown the advantage greatly, or wholly, on one side." Now, if any judge had ever said so, it would prove nothing here; for there is evidence enough to shew, that the letter of license was not fair in its creation. Perhaps no court exists that would not say, that this instrument was procured from the creditors with a view to the fraudulent transfer, concealment, &c. which so rapidly followed the date of the letter of license, and have been proven. But, in truth, these authorities do not support the counsel's position—far from it. They prove a contrary doctrine—for, in a note to the case of *Mortimer* vs. *Copper*, 1 *Brown's Chan. Rep.* 257, it is declared by the court, that the case of *Cass* vs. *Randall*, 2 *Vernon's Rep.* is badly reported, and is not law; and, it is added, that

that case is the only one which supports the position taken by the opposite counsel; but that, as the reporter mistook the decision, it is not an authority. And, as to the case in *Brown's Rep.* the counsel have not fairly cited it. The court will discover that it is not an authority to the extent they suppose. It is opposite to their principles—for the chancellor ordered an inquiry into the value of the estate, and put the party in the same situation as he would have been, had not the old man died. So that there is no authority—there can be none—shewing that, if the debtor become insolvent, he may still compel his creditors to observe their part of a contract which, from its terms, they only stipulated to perform on condition, that the insolvent would perform his. The decisions, and the reason of the thing, are conclusive against it.

The expression of judges in *Brown*, 738, and *Douglass*, 92, that a man may become insolvent, and yet his estate pay twenty shillings in the pound, may be true, yet has nothing to do with this case—for here the evidence is positive, that the estate of the Crocherons is insufficient to pay more than the first and second classes of creditors.

As to the authorities cited to shew that an insolvent may legally prefer one creditor to

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another, there are cases in which it may be done, but not to the extent to which the counsel suppose.

It is said that we admit the validity of the letter of license, and that if we destroy the assignment, the license precludes M'Bride from recovery. Let us see if this is so. 1. Too much is taken for fact, because we do not admit the validity of that instrument. 2. But, if we did, would that have the supposed effect? By no means; because, by reason of the fraudulent concealment of this property, &c. as to the Crocherons, the assignment is a nullity, with respect to creditors who dissent from it. It is upon this principle, that the Crocherons shall not be allowed to avail themselves of their own wrongs—and we did not suppose that the gentleman would anticipate what was never intended, and could not be argued with safety in a court of law. But the assignees have got possession of the estate; and, by this time, have paid away all the proceeds, though nothing has been received by M'Bride.

It is next advanced, that M'Bride attached, on the renewed notes, before they were due: But this is not so—he attached for his debt, under all the circumstances of the case, disclosed in evidence to this court.

The opposite counsel admit, that on the debtor's insolvency, all his debts are due presently: indeed, that principle of law, is too well tested to be denied; but how do they attempt to get over it;—why say the counsel, "here the Crocherons, have not taken the benefit of any bankrupt, or insolvent law; therefore we do not know that they are insolvent. Again, they forget, that their witnesses swear, that the estate will only pay the 1st and 2d classes of creditors. Are they then not insolvent?

To recapitulate.—1. The letter of license was granted by the creditors of the Crocherons, upon the condition, that they should continue in business, and pay all their debts. This condition they have broken, by making a general assignment of their property; which shews their inability to pay, or why make the assignment? But the concurrent testimony of all the witnesses is, that they are only able to pay the first and second, out of four classes of creditors—of which last, M'Bride is one, and of course can get nothing but from this attachment. 2. The property in question was excepted out of the assignment, and was not transferred to the assignees; but still continues to be the property of the Crocherons. This concealment of a large portion of their property, was a fraud up-

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on the creditors. The Crocherons shall not be allowed to avail themselve of, or benefit by their own wrongs. In truth, this was the very reason why M'Bride, after the transaction came to light, would not accede to the terms of the assignment. Had he not done so, he could never hope for payment. 3. As that property still belongs to the Crocherons, the letter of license being a nullity, has not M'Bride a right to recover payment of his debt, out of the property attached?

Mathews, J. delivered the opinion of the court. This case is in many respects, similar to that of *Ramsey* vs. *Stephenson*, lately decided in this court, *ante* 23. The debtors, in both cases appear to be insolvent, and attempted to assign their property to trustees, for the payment of their debts. The deeds of cession, in both instances, contain stipulations, by virtue of which the creditors are classed, and a preference is given to some, in exclusion of the rights of others. In the case alluded to, the assignment is of all the property of the debtor, without limitation. In the one under consideration, although from the evidence, it would seem that the defendants and appellants expressed, in their deed of assignment, an intention to con-

vey all their property; yet, it is stated by the assignees, who are witnesses in the case, that the deed, having reference to a schedule annexed thereto, nothing passed by it, except what is designated in the schedule; so that the property here attached by the plaintiff and appellee, was left under the dominion and control of the defendants and appellants.

The plaintiff's claim is opposed on the ground, that the respite granted by him, jointly with several others, who executed a letter of license, as it is termed, had not expired at the inception of the present suit: and further, that according to the stipulations of that instrument, he has forfeited every claim to payment, by an improper and premature prosecution.

The letter of license, was executed on the 19th of June 1816. On the part of the creditors, it purports to grant an indulgence to the debtors, by allowing them a term of payment, for debts then due, in consideration of their inability to pay immediately. On the 20th of September of the same year, the defendants stopped payment, and assigned their property to some of their creditors, for the purpose already stated. It appears from the testimony of these assignees, that the amount of the property ceded, is not sufficient to discharge the debts, due

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to those whom the debtors thought proper to class as privileged creditors.

No claim to the property attached having been put in, under the assignment, there is but one question to be decided. Is the plaintiff and appellee exonerated from the obligation imposed upon him by the letter of license, in consequence of the subsequent conduct of the defendants and appellants, and was he so, at the inception of this suit?

The defendants may justly be considered, as having been insolvent, at the time of executing the deed of assignment, and even so at the inception of the suit: and from the evidence, we believe that they were in insolvent circumstances at both these periods. The principles of law, cited from *Pothier* and other authors, on which the district court, seems to have founded its judgment, are strictly applicable to this case, and no doubt can be entertained of their soundness. They are common to every question of bankruptcy, or insolvency. In cases of failure, creditors, even when the time of payment has not yet expired, are entitled to receive dividends of the insolvent's estate. In other words, the debt becomes payable, by the insolvency of the debtor. The debt being thus payable, the creditor has a right to pursue all legal remedies

in his power, for the recovery of it; and may, in case of a voluntary assignment by the debtor, to some of his creditors, if he be not a party to such an agreement, seize on any property not actually delivered, under such an assignment, as we have already determined in *Ramsey* vs. *Stephenson*; and certainly with equal, or greater propriety, may he proceed against any property not claimed by the assignee, or pretended to be conveyed by the deed of assignment. This being the situation of the property, attached in the present suit, there is no error in the decision appealed from.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

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The apparent vendee, in a simulated sale, will be decreed to recovery.

APPEAL from the court of the parish and city of New-Orleans.

The petition stated, that the plaintiff's testator, finding himself in difficulties, thought proper to place a part of his property out of the

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reach of certain enemies, who menaced him with unjust law suits and prosecutions: whereupon he determined to provide a friend, who might cover it. He therefore agreed with the defendant, to give her a bill of sale of four houses and lots, apparently for the consideration of fourteen thousand dollars, of which eleven thousand eight hundred were to be paid down, and two thousand two hundred in one year—that, with a view to remove every appearance or suspicion of fraud and simulation, he should procure eleven thousand eight hundred dollars, and place them in the hands of the defendant, in order that she might pay it to him, in the presence of the notary—that this was accordingly done, and a deed of sale executed, with the only view of covering, by a simulated sale, the premises for the testator, who in reality received no consideration therefor—that the defendant, at the same time, by a private instrument, acknowledged that she had no right to the property sold, and would at any time re-convey it, on request—that the testator, some time after fell sick, and, being attended by the defendant, the private instrument was got out of his, and came into her, hands, some time before his death—that the defendant, at times, pretended to be the true, lawful and absolute owner of the property conveyed, and at

others admitted that she was only a trustee for it but, finally, declared her determination not to restore it. The petition concluded with a prayer that the notarial deed of sale be declared null and void, and the defendant decreed to account for such part of the rent as she had received.

The answer denied all the material facts stated in the petition, and averred the notarial deed of sale to be real and not feigned, that the consideration was actually and *bona fide* paid, out of the defendant's money. It admitted that the defendant, by a private instrument, bound herself to re-convey the property, but not till after a repayment of the sum advanced—that the testator finding it inconvenient to refund, returned this private instrument to her, to be cancelled, and she accordingly destroyed it.

Although the principal facts in the case, were differently sworn to by the witnesses, produced by the parties, and manifest perjury seemed to have been committed, the evidence preponderated on the side of the plaintiff.

There was judgment for him in the parish court, and the defendant appealed.

Moreau, for the defendant. The plaintiff's testator could not have been admitted to alledge

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the simulation of the deed of sale, executed by him, in favor of the defendant. The pretended simulation is immoral and illegal, and no one ought to be allowed to alledge his own turpetude. *Nemo allegans suam turpitudinem est audiendus.*

This is an invariable principle of jurisprudence, 4 *Denisart's decisions de jurisprudence* 570, *verbo* turpitude.

A convention may be immoral, in regard to either, or both the parties, *ff.* 12, 5, 1. If it be immoral in regard to him who receives, the law grants an action for repetition. If you prove evidently before the competent judge, that you gave to him of whom you complain, a sum of money, to be protected from militia duty, he will order him to refund. *Code* 4, 7, 3. It is meet, that he who has received a sum of money to restore what he had stolen, be compelled to refund, as all the turpitude is on his side. *Id.* 4. 7. 6. It is meet, that he who in consideration of the restitution of the sheep which he had stolen, has received a sum of money, should restore it as well as the sheep, or their value. *Id.* 4. 7. 7.

But when the consideration is immoral, in regard to both parties, there is no action of restitution in favor of either. *ff.* 12, 5, 3. In such

a case, the condition of him who has received, is better than that of him who claims.

Admitting that you have given *ob turpem causam*, and in contempt of the laws of my kingdom, a house to your adversary, it is in vain that you ask that it be restored to you; for both parties, in this case, being in the same predicament, the condition of the possessor is better than that of the claimant, *cum in pari casu, possessoris conditio melior habetur*. *Code* 4, 7, 2.

Whenever there is turpitude, not only on the side of him who receives, but also on that of him who gives, there is no restitution, although the obligation has been performed, and the sum paid. *Code* 4, 7, 4.

If both parties be *mala fide*, neither shall have an action against the other. *ff*. 4, 3, 36.

Every disposition, in this respect, of the Spanish law, is founded on these principles. We allow the proof of the simulation of a contract, even by mere presumptions, whenever its object is to discover the fraud of him who receives. *Partida* 5, 11, 40.

Evidence of the simulation of a contract is admitted, where the lender, in order to obtain usurious interest, requires from the borrower a simulated sale, of a property yielding fruits, in

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order to enjoy these, in lieu of interest, without accounting for them. 3 *Febrero, Juicios*, 3, 2, 4 *n.* 205—207.

It is evident that in every case, in which the fraud is only on the side of him who receives a house, under a lease, in order to cover an usurious loan, nothing can be reproached to the debtor, who is compelled, in his distressed condition, to accede to every proposition of the lender. There is then nothing contrary in the disposition of the Spanish law, which admits the borrower or seller to prove the simulation, in order to obtain relief, with the above principles of the Roman law.

But can the same be said, when a convention has no other object than a fraud, meditated against the rights of a third party? Certainly no. For in such case, there is turpitude on both sides: which ought to exclude either party from relief against the other—for neither can allege the simulation of the contract, without manifesting his own turpitude.

It is undoubtedly for this reason, that after having shewn that the simulation of a contract may be given in evidence, Febrero states that an action is however denied, when the simulation is in fraud of the fisc or of a third party. 3 *Cinco Juicios* 3. 2 & 4, *n.* 209.

The connection is evident, between this opinion of Febrero and the principle of the Roman law, which denies an action, whenever both parties share in the turpitude, and directs, that in such a case, the possession of him who holds the property shall prevail over the claim of the other. If the plaintiff's testator, and the defendant, as the petition alledges, colluded in order to cover the property of the former, and protect it from the claim of the United States, or his creditors—neither can stand in court against the other.

Mazureau, for the plaintiff. The defendant's counsel contends, that he who alledges his own turpitude, ought not to be heard—and consequently, the plaintiff cannot claim the benefit of an act, executed with a view of destroying the rights of others. This mode of reasoning is at once false and immoral. False; because if, as it often may happen, the knowledge of the simulation be confined to the contracting parties, the simulated transaction would have the effect of a real one, *plus valet quod agitur, quam quod simulate concipitur. Code* 4, 22. The first law of this title says expressly, *in contractibus rei veritas, potius quam scriptura percipi debet:* and the second: *acta simu-*

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lata, velut not ipse, sed ejus uxor comparaverit, veritatis substantiam mutare non possunt. Questio itaque facti per judicem vel per præsidem provinciæ examinabitur. Such acts are not susceptible of any effect. *Colorem habent*, says D'Argentre, *substantiam vero nullam; nulla quippe conventio initur, nullus contractus agitur, sed fingitur. Quod hujusmodi contractus est tamquam corpus sine anima*, says, Baldus, *et dicitur coloratus, depictus, extrinsecus apparens: intrinsecus nihil habens.* Immoral; because one of the contracting parties, guilty from the very act of contracting, would benefit by the simulation, to the injury of the other, and of third persons.

Will this court permit the defendant to say: the contract is a fictitious one; we entered into it, with the view of defrauding the United States, or the plaintiff's creditors; but the court must enforce it, to punish the dishonest man, who sought to cover his property, and reward me, who cunningly deceived him, and betrayed the confidence he reposed in me, that I may enrich myself at his expense and that of his creditors? Will not the court, on the contrary, compel her to empty her impure hands? *Jure naturæ equum est neminem cum alterius damno locupletari.*

If two persons have entered into a partnership of crimes, if they have agreed to rob on the highway, to coin false money, to sell copper for gold, and to divide the profits resulting therefrom, and one of them possesses himself of the whole spoil, the other will not be aided by a court of justice—the maxim *propriam turpidinem allegans non est audiendus* will apply. So if a witness has sold his testimony, and claims the stipulated price—so if a judge has pronounced upon a stipulated reward.

But the case is altogether in a simulated contract. A simulated deed, is not a deed. *Instrumentum simulatum non est instrumentum*, says Parexa, *et exceptio simulationis nunquam censetrua a statuto exclusa*, so the action is not denied. Hence nothing prevents him who asks relief against a simulated act from being heard; no matter whether he have been a party thereto or not—whether the object of it was injurious to third persons.

Dominguez says, that the only difference which exists between a case in which the party, who claims relief against a simulated contract, was a party thereto, and one in which he was not, is that, in the first case, he ought to be holden to strict proof, while in the other presumptions will suffice. *Discursos Juridicos*, 472.

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Febrero, speaking of the exceptions which may be opposed to the *via executiva*, says that simulation is one of them; and concludes that, although the party injured manifest his turpitude and his offence, which lies in making a simulated contract, he may alledge it, because he seeks to avoid his ruin and prevent his accomplice from enriching himself at his expense.

This author is in perfect accordance with Parexa—for he admits, that the plea of simulation may always be opposed. *exceptio simulationis nunquam censetur a statuto exclusa.* So he is with Dominguez, who holds that the party injured may plead the simulation, even where he was a party to the contract. But, he adds, *lo mismo puede hacer su heredero, ental que el contracto no sea en fraude del fisco o de otro tercero, sobre lo qual vease el titulo Code, plus valet quod agitur, quam quod simulate concipitur*—and the same may be said of the heir.

Febrero terminates his phrase, "provided, that the contract be not in fraud of the fisc, or of a third party. On this see the title of the Code, *plus valet quod agitur*, &c."

Let us inquire into the foundation and application of this proviso.

The preceding phrase concludes—*porque trata de evitar su dano, y este de lucrarse in su da-*

rimiento, because he, (the accomplice) seeks to avoid his ruin, and the other to enrich himself at his expense. This refers clearly to the party who alledges the simulation of his own deed, notwithstanding that he thereby manifests his turpitude and offence, *aunque manifesta su torpeza y delito*—and the proviso seems only to relate to the heir. There cannot be any dishonest simulation, except that which is committed against third persons, or the fisc. Every other is innocent, and free from turpitude or offence. I manifest my turpitude in the only case in which I oppose to my own act a simulation in fraud of a third person. Febrero declaring in clear and precise terms, that in the cases of which he speaks I may avail myself of the plea of simulation, although in doing so, I manifest my own turpitude and offence, must be understood to say, that I may avail myself of that plea, even when the simulation was in fraud of a third party.

It will be asked whether, admitting that the party may then plead the simulation, the heir has the same right? We must distinguish. Either, after the death of the party, the third party may have his claim against the heir, after he shall have taken possession of the estate, or from the nature of the claim or cause of action

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death has destroyed the demand. In the first case, I do not think that the distinction made by Febrero be applicable to the heir: for every thing is entire; the fraud is not yet consummated, and neither justice nor morality forbid that the heir should be enabled to satisfy the third party, whose demand continues to exist. In the other case, the fraud is consummated, and justice and morality forbid that the heir should recover, at the expense of a third person, that property which his ancestor removed from his reach by a fraudulent simulation.

Let us examine what are the circumstances in which a third person, from the nature of his claim, may cease to have a right on the property of his debtor, by the death of the latter.

A little reflection will convince us, that these are many: one, however, will suffice. An architect undertakes to erect a vast edifice on a given plan, within a certain time, under pain of very heavy damages. In the mean while, he discovers his to have been a rash undertaking. He makes a simulated sale of his property to remove it from the reach of the person he contracted with, who, the edifice being yet unfinished at the expiration of the period fixed, neglects to prosecute the architect, deeming him insolvent. On the death of the latter, leaving for

his heir an only daughter, not skilled in architecture, it is clear that she cannot be compelled either to continue the work begun by her father, nor to pay the damage; for she is not an architect, and her father was not put *in morâ*, nor were any damages awarded against him. It is clear, that in this case the claim is extinguished by the death of the architect. 2 *Febrero de escrituras, part.* 6, 61, *art* 23.

Let us suppose that an individual, having defrauded the fisc, covers his property to avert its pursuit—that having no visible property, he be not prosecuted. It is clear that in this case his heir cannot be prosecuted, and that the claim of the fisc died with its debtor. *Partida*, 7, 9, 23.

This is the only manner in which Febrero's distinction, or rather restriction, can be interpreted. He cites the maxim of the Roman code, *plus valet quod agitur, quam quod simulate concipitur*—according to which every simulated instrument is null and void.

If, according to the Spanish jurists, it appeared doubtful whether, even where the simulation is made for the purpose of defrauding creditors, the party may plead it, in order to regain his property, it would suffice to consult French jurists, equally skilled in the interpre-

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tation of the Roman law, and the decisions of the French tribunals.

Simulation, either in the consent of the parties or in the tradition of the thing in contracts, which *re proficiuntur*, constitute a vice which prevents the engagement to take place, so that the party may alledge it as well as any other person. *Ferriere, Dict. de droit et de prat. verbo Acte authentique.*

The court of cassation of France, which must be supposed to be composed of enlightened jurists, has always decided this question in the affirmative, whether the suit was instituted by the party or his heir. 2 *Sirey*, 24, 140. *Denever's cases of* 1808, 580.

The court of appeal of Treves, in a case between the parties to a simulated contract, decided that the action of nullity, on a simulated contract, made to the injury of a third party, may be brought by one who was a party thereto —that the simulation of an authentic act may be proved by witnesses—that the party who enters into a simulated contract, with the view of insisting on the execution of it for his benefit, is guilty of a fraud towards the other. 18 *Jurisp. du Code Civ.* 152.

The court held that the maxim, *allegans propriam turpitudinem non est audiendus*, is not

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applicable to cases of simulated contracts. The suitor who opposed it, contended that testimonial proof of the simulation of the contract was inadmissible. The court said, "the dispositions of the article 1341, of the Code Napoleon, which exclude testimonial proof against or beyond what is contained in acts, are not applicable to simulated contracts. This principle is in conformity with the ancient jurisprudence, and is confirmed by several judgments of the court of cassation, under the present legislation, and supported by the art. 1353 of the Code Napoleon, which admits testimonial proof in cases of an allegation of fraud; and by the articles 1109, 1116, 1131 and 1133, which admit it in case of allegations of want of consent, or of a false or illegal consideration—hence it cannot be said that there was an assent in a simulated instrument—nor that in a simulated contract, made with the intent of defrauding a third person, there is a consideration, much less a just and lawful consideration, and there would be manifest fault and injustice in him, who would leave the party with whom he was contracting in the belief that he would never make any use of the simulated contract, and would after claim the execution of it—whence we conclude, that tes-

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timonial proof of the simulation of the contract ought to be received."

This decision shews that, in France, where the Roman law, the source and origin of the Spanish and French laws, was generally taught and observed, the question under consideration admitted of no difficulty—and when we consider that the articles 1341, 1108, 1106, 1131 and 1133, of the Code Napoleon, on which this decision is grounded, are the same as the articles 241 of page 344, 9 and 16 page 263, 31 and 32 page 265, of our Civil Code, may we not conclude that it cannot be said that, in the act under consideration, there has been either an assent or a lawful consideration?

Farther, the question appears to be decided in another part of our statute book, in which it is declared, that counter letters have their effect between the contracting parties. *Code Civ.* 305, *art.* 221. It is clear, that counter letters are never used, except in simulated contracts—*ergo* the party must have his action to cause the nullity of the contract to be declared, otherwise in what case can a counter letter be of any avail? Let it not be said, that this must be with the distinction in Febrero. The Code has made no distinction, and *ubi lex non distinguit, nec nos distinguere debemus.*

In civil cases, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent. *Code Civ.* 6, *art.* 21. Have we any precise law on the subject under consideration? None can be produced. It is then to equity, to natural law, to reason, that we are to resort. Equity, natural law and reason forbid that the defendant should retain the property of the plaintiff's testator—they do not forbid that a man, who has given a simulated bill of sale of his property, should cause it to be annulled, in order that he may be enabled to pay his creditors, whom he may once have had the intention of defrauding.

But a simulated sale, made with the view of covering the property sold, is not necessarily fraudulent.

Judicial proceedings may be just or unjust. They are just where the sums claimed are justly due—they are surely unjust, where chicanery, or the absence of the proof of the payment, may cause a decision contrary to the merits of the case. In the first case, the simulation by which the debtor seeks to render the proceedings vain and useless, by removing his

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property from the reach of his creditors, is certainly fraudulent. It is certainly otherwise in the second.

Now, there is not any evidence of the intention of the plaintiff's testator, in covering his property, except that which results from the petition. Nothing therein shews that his views were dishonest, that he had in view to defraud any of his creditors, and that he meant to resist any, but unjust prosecutions.

There cannot be any doubt that the executor of a party to a simulated contract may exercise the action, which the law might refuse to his testator, to have it rescinded.

If he was only the mandatary of the deceased, he could not; but he acts for the creditors. It is his duty to collect all the debts and effects of his testator to pay them.

Martin, J. delivered the opinion of the court, Mathews, J. dissenting. The defendant's counsel contends, that the present case is not one in which a court of justice is to yield its aid to the plaintiff. *Nemo allegans suam turpitudinem est audiendus*—that the right of the plaintiff, admitting that he has any, arose *ex turpi causâ, ex dolo malo*—that her possession ought to be protected: courts of justice always

assisting a party to whom an estate has been voluntarily conveyed, in retaining and sometimes in obtaining it.

A majority of this court is of opinion that, however conducive to the extirpation of fraud, a decision in favor of the defendant might be, it would be contrary to the principles which have hitherto prevailed, and which they do not deem themselves at liberty to disregard.

The maxims *allegans suam turpitudinem non est audiendus—ex dolo malo, ex turpi causâ non oritur actio—in pari delicto melior est conditio possidentis*, appear indeed to have been applied where a plaintiff sought the price or reward stipulated in an illegal or immoral agreement *e. g.* if any thing be given to a judge to corrupt him, or even to induce him to decide in favor of the giver, even in a good cause: *ut male judicetur, ff.* 12, 63—*ut secundum me in bonâ causâ. Cod. tit.* 3—or, in a similar case, to a witness: *die idem in teste, eod. loc. n.* 7. In such cases the plaintiff is not allowed an action to recover what he has *absolutely* given; neither could any thing thus stipulated for and not paid, be recovered; but no where do we find that any thing parted with *temporarily, ob turpem causam*, is not to be recovered.

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In the French tribunals, property avowedly transferred, for the purpose of being kept from the reach of creditors, is allowed to be recovered by judicial process, if the transferee refuses to re-convey. *See the cases, cited by the plaintiff's counsel, ante* 138.

Under the late territory of Orleans, the principal and legal interest was allowed to be recovered on a contract, on which illegal interest had been stipulated—an illegal contract, *ex turpi causâ*. *Caisergues* vs. *Dujarreau*, 1 *Martin*, 7.

Courts of chancery, in England, allow the lender, on an usurious contract, his principal and legal interest, when the borrower brings him before them.

Money paid to obtain a place is allowed to be recovered. *Douglas*, 471. So the premium in the case of an illegal insurance, before the event on which the suit depends. *Tenant* vs. *Elliott*, 1 *Bos. & Puller*, 3. So the money staked on an illegal wager, before the contingency happens. *Lacaussade* vs. *White*, 7 *T. R.* 535, *Cotton* vs. *Thurland*, 5 *T. R.* 405.

In all these cases, the court lent their aid to the plaintiff, who sought to extricate himself from difficulties in which he found himself, in consequence of his violation of the law—of his having entered into a forbidden contract. We

are unable to discover any distinction between these and the case before us. But the counsel of the defendant further contends, that courts of justice never yield their aid to those who seek to prevent the execution of the law, or, which is the same thing, to prevent the execution of the judgment of a competent tribunal.

The case of *Hunway* vs. *Eve*, 3 *Cranch*, goes as far as any to establish this position. But there again the plaintiff sought to recover that which could never have been obtained, without a violation of an act of congress.

In all the cases we have cited, the plaintiff sought to countervail and violate the law, and had actually violated it. It forbids stipulating for interest above the legal rate—the party who had done so, had violated it, and was relieved. It forbids the purchase of offices and to give or receive money to be appointed or to appoint thereto: in the case cited from *Douglas*, the plaintiff, having given money to obtain a place, had violated the law; but, having failed to obtain it, was relieved. It forbids illegal wagers and insurances; and in the cases cited from the English term reports, plaintiffs who had paid money on such illegal contracts, broke the law, and were heard in court.

In the present case, the plaintiff sought to

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avert the consequences of threatened or impending prosecutions, covered his property, and re *integrâ* died. His case is perfectly similar to those we have just cited.

We find no instance in which a plaintiff similarly situated was denied relief, except under the common law of England, and the statute of Elizabeth, which declare fraudulent conveyances binding on the parties. But neither the principle of the common law of England, nor the disposition of the statute of Elizabeth, are known to the laws of this state, and we are bound to disregard them.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

CHAPILLON & WIFE vs. *ST. MAXENT'S HEIRS.*

When the wife expressly renounces the benefit of the laws in her favor—when she binds herself with her husband, she cannot demand proof of the

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The ancestor of the defendants bound herself jointly with her husband, and mortgaged her property for the payment of a debt due by him

to the ancestor of the plaintiff, (Madame Chapillon) and the claim is now resisted on the pleas of prescription, payment and the nullity of the obligation, with regard to the ancestor of the defendants, (Madame St. Maxent.) There was judgment for the plaintiffs, and the defendants appealed.

debt having been created for her benefit.

There is no evidence of a payment, and the plea of payment is repelled by the institution of a suit against Madame St. Maxent's co-debtor.

The act is said to be null as to her, because it cannot create an obligation on the wife, who bound herself with her husband, unless it be shewn, that the debt was created for her advantage, or extinguished one which she was bound to pay. But, there is a complete renunciation of the law under which advantage could be taken of this matter, and the case cannot be distinguished from that of *Brognier* vs. *Forstall and wife*, 3 *Martin*, 577.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Livingston for the plaintiffs, *Morel* for the defendants.

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JOHNSON vs. DUNCAN & AL.'S SYNDICS.

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A bill of exceptions to the admission of a witness will not be noticed, if the fact proved by him, be proved by other legal testimony.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff brought this suit, to compel the defendants to admit him amongst the co-sharers of the proceeds of the estate, as bearer of several notes of hand subscribed by said bankrupts.

The indorser of those notes being produced to prove the signature of the subscribers, objection was made to his competency, and a bill of exceptions was filed, on which the present appeal is grounded.

But as it appears on the record, that the same fact was also sworn to by an irreproachable witness: no notice need be taken of the bill of exceptions.

It is therefore adjudged, and decreed, that the judgment of the district court be affirmed with costs.

*** On the motion of the appellants, a rehearing was granted. See *February term*, 1818.

Ellery for the plaintiff, *Duncan* for the defendants.

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A will, attended with all the formalities required by law for an olographic will, is good as such, although it may appear that a mystic will was intended.

The superscription is not an essential requisite of a sealed olographic will.

APPEAL from the court of the first district.

Marie J. Broutin, wife of the defendant, made her last will and testament, entirely written, signed and dated with her own hand, enclosed it under a sealed cover, and in the presence of the number of witnesses required by law, presented the packet to a notary, who drew up thereon an act of superscription, as in the case of a mystic will.; but omitted to insert therein, that the testatrix had declared, that the will was written by herself, or by another by her direction, and that it was signed, or not signed by her. After her death, the will having been admitted in the court of probates, the plaintiffs, heirs at law of the deceased, brought the present suit, to have the will set aside.

There was judgment in their favour, and the defendant appealed.

Livingston for the plaintiffs. The decision of the district court is perfectly correct. It clear-

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ly appears, that the testatrix intended to make a mystic will. Hers cannot be valid as such, on account of the omission in the act of superscription of her declaration, that the will was written by her, or by another by her direction, and that it was signed by her or not, as the case may be. This is expressly required by our statute, *Civ. Code* 230, *art.* 99. In the case of *Pizerot* vs. *Meuillon's heirs*, this court recognized the principle, that all the solemnities required, in the execution of testaments are matters of strict law, and ought to be observed, 3 *Martin* 114, and in *Knight* vs. *Smith*, held that a testament, being the solemn declaration of the testator's will, according to positive law, every formality required by law for the enacting of it, may be considered as a condition, without which the instrument is not complete—That it is on the compliance of these formalities alone, that the law is willing to recognize the testament as legal, and to suffer the established order of succession to yield to the will of the testator. *Id.* 163.

But, it was contended in the district court, that although the will is invalid in the form of a mystic will, which the testatrix intended to give it, yet it is good as an olographic will, it being entirely written, signed and dated, in the handwriting of the testatrix, which it is said,

is every thing which the law requires for the perfection of an olographic will. *Code Civ.* 830, *art.* 103.

This is true, with regard to open olographic wills; but the code informs us, that the olographic will is either open or sealed; and that when it is sealed, it needs no other superscription than this, or words equivalent, *this is my olographic will. Id. loc. cit.* This is certainly a negative pregnant with an affirmative. If it need no other superscription, it needs that. If it need that and has it not, it lacks one of the formalities required for its perfection, and it is therefore invalid.

But we contend that it is necessary, that the will be perfect, in the form which the testator began to dispose of his property. Although the will have all the formalities which the law requires for its perfection, in any of the other forms, which the law recognizes, if it wants any of those which are required in a will, of the form which the testator adopted, it is invalid. Such was the jurisprudence of the Parliaments of France, before the revolution; such is the opinion of the celebrated *Ricard, part* 1. *n* 1609.

It is true some cases may be found, in which some of these tribunals supported a will, deficient in some of the formalities required for those

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of the particular kind, which it was the intention of the testator to follow; but this was in consequence of a special clause contained in the wills so supported, that the intention of the testator was, that "the will might be valid, in the best possible form, or without any other formality." But the will, which the testator intended to make, was one that bore some relation to the kind of will, in which the court declared it perfect, for could the court declare a will, evidently intended to be olographic, to be valid as a nuncupative one? Certainly not.

How can it be contended, that a will intended to be olographic, will be good as a nuncupative one; while these two kinds of wills have opposite characters? In the one, the testator conceals the objects of his liberality from the eyes of the whole world, he does not even call a single witness; in the other he openly declares his last intentions to a public officer, attended by a number of witnesses.

Moreau, for the defendant. If the will is not good as a mystic one, it is so at least as an olographic one. The testatrix clearly intended to make a will of the latter kind, although from surabundant caution, she caused it to be enclosed as a mystic one.

The will is wholly written, signed and dated in her handwriting, and declared to have been done double-distinctive characteristics of an olographic will. The mystic will may indeed be written and signed, in the handwriting of the testator; but the date is not an essential requisite of it. *Code Civil* 28, *art.* 99.

The mystic will, ought to be delivered to the notary, and remain in his hands: it needs not then, to be made double. The olographic will requires no such a deposit; and it is prudent that it be double, to guard against the loss of one of the originals.

Even if the testatrix had declared her intention to make a mystic will, her will would have been good, if it was in the olographic or any other legal form.

The question, whether a will irregular in the form, which the testator meant to give it, might be good if made in any other legal form, was often agitated in France, but always decided in the affirmative before the revolution. Since the promulgation of the Napoleon code, it has been agitated in the court of cassation, of which the celebrated Merlin was Attorney-General. It is known that this officer, always a jurist of the highest standing, gives his opinion to the court, after the arguments of counsel, and that such

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opinions have the greatest weight. We may judge of this by the authority which the conclusions of the celebrated D'Aguessau, while Attorney General in the parliament of Paris, maintain to this day.

Dominique Cassaubon, had made a will, which was found in a packet, sealed but without any superscription. It was wholly written, signed and dated in the testator's handwriting, in which was the following clause. "I charge my heirs, hereafter named, to pay annually the expenses of two funeral services, which it is my intention to establish this moment, for ever, as I establish them by this *closed and secret* will, wholly in my handwriting, without the necessity of any other formality."

On this, two questions arose, which are important in the present case. Whether a will wholly written, dated and signed, in the testator's handwriting, might be rejected as an olographic will, because the testator had called it a closed and secret will, and had enclosed it in a sealed cover? Whether a mystic will, invalid as such, for want of the proper act of superscription, might be valid as an olographic will, being written, signed and dated in the handwriting of the testator?

On the first, the case being less favorable than

purs, as the testatrix did not use the words *closed and secret*, Merlin was of opinion that, whatever might have been the intention of the testator, as to the form he meant to give to his will, it was valid, if attended with all the requisites of the law, in wills of any other form. The law *de testamento militari*, in the digest, says Merlin, establishes it as a principle, not only in the wills of soldiers, but in those of all other persons, that it never can be presumed, that in chusing the particular form of his will, the testator intended so to confine himself thereto, that in case he omitted any formality therein, his will should remain without execution. *Nec credendus est quisquam genus testamenti elegere ad impugnanda judicia sua.* Natural justice and the law, require that validity should be given to a will, in which the testator has complied with every formality established by law, in some of the forms which it authorizes, although the testator, when he began his will, intended to give it some other form, but omitted some of the formalities it requires." 5 *Questions de droit*, 225.

On the second question, Merlin, after citing the opinion of Ricard, quoted by the plaintiffs' counsel, shews its opposition to the law *de testamento militari*. He proves that Ricard has

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been led into an error by a false application of the law 19, *Cod. de Codicillis*; and concludes—"can it be presumed, that a testator, in choosing a particular form for his will, intended to make a parade of his learning and skill, and render the execution of his last intentions depending on the exact fulfilment of every requisite formality? The choice of the form must be, to him, a matter of perfect indifference—and he cannot be supposed to have had any other thing in view, but the disposition of his property in a mode that may be effectual." He next cites four decisions of the parliaments of Bordeaux, and of Toulouse, declaring valid as nuncupative wills, which were null as mystic wills, and two other of the parliaments of Metz and Dijon, who declare valid as olographic, wills closed and sealed in the form of mystic ones: the first with the requisite act of subscription, but which had not been deposited: the last without any such an act, but styled a mystic will, in the body of it. *Id.* 227. The last judgment, that of the parliament of Dijon, was confirmed in the king's council.

We cannot doubt that these principles would have been recognized by the court of cassation, in the case of the will of Dominique Casaubon, had not Merlin, himself, declared his opinion

that it could not be valid, as an olographic one, because wills of this kind were not admitted in Bayonne, where it was made.

The plaintiffs' counsel has contended, that one of the grounds of these decisions is, that the mystic wills thus held valid, as olographic, contained the clause that the testator *desired that they might be valid in the best possible form, or without any other formality.* Casaubon's will had this clause—yet it was declared invalid for the reasons we have given; but the clause does not appear to have been in the wills declared valid, by the decisions of the parliaments of Metz and Dijon, which I have cited.

But, why should we resort to foreign jurisprudence, while our own statute book contains a provision, that testaments and codicils, which the testator may please to cover and seal, will still be valid, as nuncupative testaments and codicils, if they be clothed with the formalities prescribed for the validity of these kinds of acts respectively? *Code Civ.* 231, *art.* 104.

In vain will it be contended from the words *shall be valid, as nuncupative testaments,* that wills of the latter kind only are to be understood, and that the provision does not reach olographic wills. This objection is equally contrary to the letter and spirit of the law. The legisla-

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tor had not in mind nuncupative wills alone here—he says, "*testaments and codicils*, which the testator may please to cover," &c.

But, it is asked, how can it be contended, that an olographic will shall be valid as a nuncupative, when these kinds of wills have by law, opposite characters? We answer that, in Spanish law books, the words nuncupative and open are indiscriminately used.

The solemn will is of two kinds, *written* and *nuncupative*—the written commonly called closed *cerrado*—the nuncupative, commonly called open. 1 *Febrero Contractos*, 1 § 1, *n.* 4.

Taking then the words open and nuncupative as synonimous, it will follow, that any kind of will, which the testator may put under cover and seal, may be valid as an open one, if it be besides clothed with every other requisite formality: and olographic wills, which are open wills, will be necessarily included.

That this is not a forced construction, and that no difference ought to exist, between olographic and nuncupative wills, which have been put under cover and sealed, will be apparent, if we reflect, that the same rule which induced the parliaments of Toulouse and Bordeaux to give validity to mystic wills, not attended with all the formalities which this kind of will re-

quires, as nuncupative, induced those of Metz and Dijon to support, as olographic, wills which were irregular in the mystic form, which the testator intended to give them.

The disposition of the Civil Code, which relates to the superscription of olographic wills, put under cover and sealed, is not imperative.

It is true, the object of the law is, principally, to command, to forbid, to permit and punish; but some times it only recommends and advises. The statute says, it is prudent to deposit it (an olographic will) with a notary, to prevent its being purloined, though not being deposited will not make it void, if it be acknowledged and proved in the manner hereafter directed. *Code Civ.* 230, *art.* 103. It is then clear, that the object of the law is sometimes to advise. Many other instances of this might be cited.

The law did not speak in more imperative terms of the superscription of an olographic will, put under cover and sealed. "When it is sealed, it needs no other superscription than this, or words equivalent, *this is my olographic will or codicil*—which superscription must be signed by the testator." *Id.*

If the legislator had intended to render this superscription essential, a *sine quâ non*, would he have used such loose expressions? What is

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meant by equivalent words? Were they not intended to signify that the testator should sufficiently designate the packet as containing his will, lest an indiscreet hand should open it, and in order that after his death it might be presented to the judge, to be by him opened?

Admitting that the superscription is a *sine quâ non*, was not in the present case the intention of the legislator fully complied with by the testatrix, by the act drawn by the notary, in which she declares that the packet contains her will, which she has presented to the notary; an act which she subscribed?

If the exemption from the pain of nullity in respect to the form of the act of superscription has not been as formally pronounced, in the article of the Code cited, as in the case of the want of the deposit of an olographic will, it may be said to have been as strongly, though impliedly, pronounced, if the whole article be read, and each part compared with the others.

After giving the form of the superscription, the Code proceeds—" an olographic testament or codicil shall not be valid, unless it be entirely written, signed and dated with the testator's hand. It is subject to no other form. *Id. art.* 103.

The plaintiff's counsel contends, that these words, *it is subject to no other form*, refer to

every thing that is required in the article, and not to what is stated in the phrase only. But a close examination of the article will convince the court, that the legislator had not in view what had before been stated—for, in that case, the plural would have been used—*it is subject to no other forms.*

It is not reasonable to conclude, that the legislator would give more effect to an open olographic will, than to one which, clothed with the same formality, would have been put by the testator, under a sealed cover. What end could the legislator promise to himself? An olographic will, put under a cover and sealed, may be taken out of the cover, and then cannot be distinguished from one which never was sealed up. How easy would it be to cure the defect in the superscription, by taking out the will and destroying the cover?

Another reason to conclude that the superscription of the cover of an olographic will is not an essential requisite is, that no evidence is required of it, at the opening of the cover, and it suffices that the will be proved to be wholly written, signed and dated in the hand of the testator. *Code Civ.* 214, *art.* 160. When we contrast this with the solicitude of the legislator, in requiring proof of the act of superscription

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of a mystic will, we must conclude that the prescription of an olographic will is of little importance. The reason is, that there is no danger of the alteration of an olographic will, which must be wholly written by the testator, while the mystic will, not being necessarily written by him, must be connected with the act of superscription, to be identified.

MATHEWS, J. delivered the opinion of the court. Considering, as we do, the formalities prescribed by law, for testaments to be of such solemnity and substance, that they must punctually and entirely be fulfilled, we are of opinion that the will, under consideration, cannot be supported as a mystic one: although it was closed, sealed and delivered to the notary, in presence of a sufficient number of witnesses, and the act of superscription drawn up by him, (in a style, indeed, confuse and indefinite, but perhaps sufficiently intelligible, to give validity to the instrument, were it perfect in other respects,) is deficient in a material formality: the testatrix not having declared, at the time of handing the will to the notary, whether it was written by herself, or by another by her directions, and whether she signed it or not. This is a defect, which destroys the validity of the

will, as a mystic one. It remains to be examined, whether it be valid as an olographic will.

The question, whether a will which, on account of informality in its execution, is void in the form intended to be used by the testator, can and ought to be supported in another, provided it be clothed with all the requisite formalities, seems, from the authorities produced, to have been agitated in France, before the introduction of the Napoleon code. In its solution, a contrariety is found, both in the determination of courts of justice, and in the opinions of jurists. Under the operation of the code, this question, although raised in several instances, does not appear to have been formally decided.

Merlin, in his *Collection de questions de droit*, in the case of a contested will, discusses extensively the question now under consideration.—Whether a mystic will, not valid on account of imperfections in the act of superscription, can be valid as an olographic will, when wholly written, dated and subscribed, in the handwriting of the testator? The general maxim, as laid down by Ricard, in his *Traite des donations*, much relied on by the counsel for the plaintiffs, is cited and commented upon by Merlin. It refuses validity to a will, imperfect in the form, which the testator adopted for ma-

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king it, notwithstanding it may be attended with all legal formalities, necessary, to give it effect in another form. But Ricard's doctrine, says Merlin, is contrary to a general principle, *ff.* 29, 1, 3, not only for the wills of soldiers, but for those of other persons. It ought not to be presumed that, in choosing one form of making a will, a testator intends so to bind himself to it, that, on the omission of any formality required for the perfection of his will, in such a form, it should remain without effect in any other. *Nec credendus est quisquam genus testandi eligere, ad impugnanda judicia sua.* According to this principle, which we believe to be sound and rational, when a testament is perfect, in either the forms, in which it may lawfully be made, although not complete, in the one apparently intended to be used, it ought to be considered as valid and effectual. Ricard himself, *n.* 1617, acknowledges that his opinion is founded only in conjectures, with regard to the wishes of the testator, who, it is presumed, had no intention of disposing of his estate in any other form, than that which he had chosen, yet, when the contrary is expressed by him, in declaring that his will should have effect, in any other in which it may avail, it is

good and valid, if attended with all the formalities required by law for any form of testament.

It is really difficult to perceive, why an expression of this kind should be received, as giving additional force to a belief, that the testator in making his will, is desirous that its dispositions should be carried into effect. On the contrary, can any thing be more absurd, than to suppose that a man, in the solemn act of making his will, should ever intend so to shackle himself with any particular form, as to preclude the possibility of his will prevailing in any other allowed by law, in which it might be good, although invalid in that which he seems to have chosen?

The formalities, prescribed by law for the perfection of wills, are intended to prevent forgery and perjury—to give confidence to every citizen, that his real wishes, with regard to the disposition of his property, after his death, will be honestly carried into effect, without fear of injustice from forgery and falsehood. This wise purpose of law is certainly fully complied with, whenever it can be made appear, that a will is valid in any of the forms prescribed. But admitting that on general principles of law, the will in contest ought to prevail, say the plaintiffs' counsel, it is null and void, according to

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the dispositions of our civil code. Wills are divided into three principal classes, nuncupative or open, mystic or closed and olographic: each of which require particular formalities.

The will, being declared null and void as a mystic one, it is not pretended that it is attended with the formalities required, to give it effect as a nuncupative will. It only remains for us to give a just and fair construction to the provisions of the civil code, on which the plaintiff's counsel relies, to shew the nulity of the will, as an olographic one. They are these:

An olographic testament may be either open or sealed: but, when it is sealed, it needs no other superscription than this, *this is my olographic will*: which superscription must be signed by the testator. An olographic testament shall not be valid, unless it be wholly written, signed and dated with the testator's hand. *Code Civ.* 230, *art.* 103. Testaments and codicils, which the testator may please to cover and seal, will still be valid, as nuncupative testaments and codicils, if they be clothed with all the formalities prescribed for the validity of these acts respectively. *Id.* 104.

Under these rules it is contended, that the present will cannot be supported as a sealed olographic will; because it has not the superscription required by law, nor any thing equiva-

that: further, that, having been sealed by the testatrix, it can have no validity, as an open olographic will; because the last article cited from the code gives validity to such only, when they have the formalities prescribed for nuncupative wills.

It is clear, from every circumstance in the case, that it was not intended by the testatrix to make a sealed olographic will. The superscription on it was intended to be that of a mystic will, and has nothing equivalent to that of a sealed olographic will, and the will therefore cannot be valid as such. If, by a correct construction of the 104th article, it cannot avail as an open olographic will, we will have to lament the absurdity of a rule, which gives a preference to one form of wills over another, to which it is not rationally entitled. But, this we do not believe to be the case. From an examination of all the definitions and rules on the subject of wills, we are of opinion that it was not the intention of the legislature to confine this liberal provision of law to wills strictly and technically termed nuncupative. The definition of them is in the alternative, nuncupative and open, and gives them a character distinct and separate from the mystic or closed. Not so, in relation to wills, which have the olographic

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form—they may be either open or closed: and, notwithstanding it may have pleased a testator to cover and seal up his will, its validity shall not be destroyed; or, in the language of the code, it will be good as a nuncupative will, if it be attended by all the formalities prescribed for such acts respectively. This provision of the law is introduced after the classification of wills, and a minute description of all the formalities necessary to the perfection and validity of wills of each class. It is not expressly declared that a will, which may have been sealed up by the testator, shall not be good in any other form except the nuncupative, limitedly and technically so called—nor do we believe that the legislature, in using the word nuncupative, intended to exclude the olographic will from the same provision, provided it has the formalities required: because the one form is not entitled to any preference above the other, and if there be any difference, in favor of either, the olographic ought to have it—being equally or more secure against perjury or forgery—because the word nuncupative may be taken in the alternative, open, and would then be opposed, in the common acceptation of the word, to closed or sealed, and consequently the expression of the code will allow validity to any will perfect

either of the open forms, although it may have been sealed up by the testator.

Upon the whole, we are of opinion that, notwithstanding the will under consideration is null and void, as a mystic will, which the testator seems to have intended to make, it may and ought to be valid, as an olographic will, should it be proven to have all the formalities required for a perfect olographic will. As it is declared, in the body of it, that it was made, written, signed and dated, in duplicate, in the handwriting of the testatrix, which seem to be all the formalities required for the perfection of an olographic will, we think that the district judge erred in refusing to permit the defendant to prove by witnesses the handwriting of the testatrix, in the manner prescribed by law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the cause be remanded, with directions to the judge to allow the defendant and appellant to prove, by legal testimony, all facts and formalities required by law, for the validity of olographic wills—particularly, that the will in the present case, is entirely written, signed and dated with the testatrix's hand.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1817.*

West. District. *Sept.* 1817.

BARRABINE & AL. vs. BRADSHEARS.

APPEAL from the court of the fifth district.

If a deed describes the land sold as of twenty arpens, with the ordinary depth, the interlineation of the words *in front*, does not vitiate it.

MATHEWS, J. delivered the opinion of the court. This case is before us, on a bill of exceptions, taken to the opinion of the district court, in rejecting a sheriff's deed, which was offered in evidence, by the defendant, to support his title to the land in dispute.

The deed thus rejected, describes the land seized and sold, as a tract of land of twenty arpens, more or less, in front, with the ordinary depth, on or near the bayou Yokely, in the pa-

* There was not any case determined during August term.

rish of St. Mary. The words *in front*, are interlined, and the interlineations is noted at the foot of the deed, as having been approved by the sheriff: but it does not appear whether this approbation was made before, or after, the execution of the deed.

The defendant and appellant insists, that this interlineation is not a material one, and that, if it be, it was noted as the law requires.

The opinion of the court being, with the defendant, on the first proposition, it will be unnecessary to examine the other.

The description of a tract of land in a deed of sale, is necessary to fix the local situation, and ascertain its contents.

The interlineation, in the deed under consideration, appears to have been intended for the latter purpose. A tract of twenty arpens, with the ordinary depth, situated on the bayou Yokely, is stated to have been seized and sold. Now, if, by this description, the number of superficial arpens, intended to be sold, may be correctly ascertained, without the words *in front*, these words are immaterial, and their interlineation ought not to vitiate the deed. The expression, *with the ordinary depth*, is a technical one, by which, when applied to a survey of land, is always understood in extent of forty

West. District Sept. 1817.

HARRISON & AL. vs. BRADBERRY.

arpens. A tract of land, described as containing twenty arpens on a water course, or any thing which may form a line for it, with the ordinary depth, conveys to those, in the least acquainted with the manner in which the Spanish government laid out the land of the public domain, the idea of the superficies produced by multiplying 20 by 40, which, in the present case, was the quantity of land intended to be sold.

If any uncertainty exists in the present case, in consequence of the description not fixing the survey absolutely on the bayou, this will not be removed by the addition of the words *in front*.

From this view of the subject, we are of opinion, the district court erred in rejecting the deed on account of this interlineation.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and the cause remanded, with directions to the district court to admit the deed in evidence, if there be no other objection.

Porter for the plaintiffs, *Brent* for the defendant.

West. Dist. Sept. 1817.

LARTIGUE vs. BALDWIN.

LARTIGUE vs. BALDWIN.

APPEAL from the court of the fifth district.

The surety in an attachment bond is bound, though, at the time of its execution, no such a bond was legally demandable.

The record of a suit, in which judgment was obtained against his principal, is not evidence against him.

DERBIGNY, J. delivered the opinion of the court. A bond was subscribed by the defendant, as surety for one Boudreaux, the object of which was to secure the present plaintiff against any loss which he might suffer, in consequence of an attachment sued out against him, in case that attachment should not be prosecuted to effect.

Boudreaux, having failed in that action, was sued for damages by the plaintiff, who obtained judgment against him; and, after a return of nulla *bona* on the writ of execution issued on said judgment, the present defendant is sued upon the bond.

It appears that, on the trial of the present case, no other evidence was offered by the plaintiff than the record of the suit in which he succeeded against Boudreaux—but that the district court thought that evidence sufficient to warrant a judgment against his surety.

Two principal grounds of defence are relied on by the appellant—1. That the bond is not a valid one—2. That, admitting it to be valid, no proof has been adduced against him of the

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LAVERGNE vs. BALDWIN.

amount of damages for which he may be liable as surety for Boudreaux.

1. His first position is sub-divided into several points, most of which tend to shew that the bond is irregular; but such allegations from the mouth of an obligor ought not to be listened to; they are silenced by that law, already referred to by this court in other cases, which provides "that in whatever manner a person shall appear to have deemed it proper to bind himself towards another, he shall remain bound." *Recop. de Cast.* 5, 16. One objection, however, is entitled to more attention than the others: it is that by which the defendant has endeavored to establish that, at the time this bond was subscribed, no such bond was required by law to obtain an attachment, and that this is consequently an obligation without cause. The premises may be true; but the consequence does not necessarily follow. A voluntary promise to indemnify another against any loss which he may suffer by an act of ours, is surely not an obligation without cause on the part of the principal obligor; and, if valid on his part, must be equally binding on the person who joins him in the obligation, and agrees to indemnify the obligee, if the principal obligor

less not. The bond, therefore, is viewed by this court as a valid obligation on the part of both the principal and his surety.

II. But the defendant objects that, if his obligation is binding, it is so only so far as the loss suffered by the plaintiff shall be proved to amount. The plaintiff has, indeed, made such proof in his suit against Boudreaux—but in that the defendant was no party. In the present case, he has produced no other testimony than the record of his suit against the principal obligor, and has relied on that to obtain judgment against his surety.

There is no rule of our laws better understood than that which allows to the surety the right of availing himself of the same means of defence (save those that are merely personal) which the principal debtor could resort to. That principle is founded on the sacred maxim, that no one ought to be condemned without being heard, and consequently that no person shall be bound by a judgment to which he was no party. We do not deem it necessary to adduce authorities in support of these truths.

But it has been suggested that, by suffering the testimony to be introduced, the defendant

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not only waived any objection to its legality, but must be considered as having actually acquiesced in its contents. The answer to this is, that the testimony was not improper, so far as it went to establish that Boudreaux had been sued—that judgment had been recovered against him—and that, on the execution, no property had been found to satisfy it. The defendant, therefore, acted consistently, when he made no objection to its introduction; but it does by no means follow, that he is to be viewed as having acquiesced in its contents, as settling the question of damages between him and the plaintiff.

Upon the whole, we are of opinion, that the district judge erred in considering the evidence produced in this case as proving against the defendant the amount of damages, which the defendant was liable to pay.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and this court, proceeding to give such judgment as, in their opinion, ought to have given, does order, adjudge and decree, that the plaintiff, not having shewn the amount of the damages he has sustained, do recover one dollar, with the costs of the suit in the district court.

Brent for the plaintiff, the defendant in *pro-per persona*.

West District. Sept. 1817.

LARRIEUX vs. BALDWIN.

KING & AL. vs. MARTIN.

Settlers, entitled to a grant, under the 2d section of the act of congress of March 2, 1805, may prescribe from that day.

APPEAL from the court of the fifth district.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs and appellants, claim a tract of land, which is in the possession of the defendant. Both parties have obtained certificates from the commissioners of the land office, confirming their claims, so far as the United States were concerned. These certificates should therefore be kept out of view, and the respective rights of the parties ascertained independently of them.

The plaintiffs, whose duty it is to make out a good title to the property in dispute, exhibit, in the first place, an order of survey, issued in favor of their ancestor by the Intendant of the province of Louisiana, under the government of Spain, and a plot of the survey, made in consequence of that order, by the surveyor general of that government. Here they stop; and here the question has been raised: Is this such a title as is required by law, to enable a plaintiff to oust a possessor; or in other words, did the order

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King & al. vs. Martin.

of survey, on which the plaintiffs rely, give to the applicant the ownership of the land, which they now claim?

This court is inclined to believe that an order of survey, though not amounting to an absolute and irrevocable grant, yet gave the grantee such an equitable title as to authorize him to maintain a petitory action against a possessor having no title at all. But, as the decision of this case will turn upon a point totally unconnected with that consideration, we do not find it necessary to decide that question in this case.

Admitting, therefore, the title of the plaintiffs to be full and complete, it is alledged that they have lost it by suffering the defendant to remain in quiet possession of the land during more than ten years.

Nothing has become more familiar in our courts than the doctrine of prescription. The principal ingredients of the kind of prescription here claimed, are good faith and a just title on the part of the possessor; or in other words, it must appear that he had a just title, and believed, that by virtue of that title he was the owner of the thing.

It is objected by the plaintiffs, that the defendant was not possessed with a just title, nor indeed with any title at all, the length of time re-

gained by law. In support of that position they allege, that the first settlement of the person, whose improvements the defendant's ancestor acquired by purchase, was made without any title, and that the defendant continued to hold it in the same manner until they obtained the certificate above mentioned, that is to say, until August 1811.—They maintain that the act of Congress of the 2d of March 1805, 1 *Martin's Digest* 240, under the second section of which that certificate was issued, gave them no title, but merely held out the promise that they might obtain one; and they rely on the principle that prescription does not run in favor of those, whose title depends on the accomplishment of some condition, because in such a situation the possessor, being uncertain whether that condition will take place, cannot in the meanwhile consider the thing as his own.

But this court is of opinion, that so soon as the law above mentioned made its appearance, the settlers, who were within the purview of it, were authorized to consider as theirs the land on which they were established, because their right to obtain a patent, did not depend on any contingency not within their control, nor indeed on any contingency at all, but was to be delivered as a matter of course, on their showing

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that they were embraced by the dispositions of the law; to wit: that at the time of the enacting of it, they stood in the situation and had the qualifications required by law, to be considered as owners of the land on which they were settled. Nothing here depended on a condition to be accomplished *in futuro*. Their title was created by the law, not by the certificate which was nothing more than the acknowledgment, that the title existed.

It is in proof, that the defendant has been in peaceable possession of the land in dispute, more than ten years since the date of the act. We think that he ought not to be disturbed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Porter for the plaintiffs, *M'Nutt* for the defendant.

T. & D. URQUHART, EX'RS &c. vs. *TAYLOR.*

When the judgment is reversed for want of reasons, the court may proceed and render such a judg.

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. The district judge did not give any rea-

son, nor cite any law, in giving judgment in this case, and the defendant and appellant, presenting this as an objection thereto, under the constitution of this state, *art.* 4, § 12, we are bound to sustain it, and the judgment is therefore annulled, avoided and reversed. *Laverty & al.* vs. *Gray & al.* 4 *Martin*, 468, *Sierra vs. Slort, id.* 316.

ment as ought to have been given below.

If an executor receives a note from his testator's debtor, he may sue thereon, after the expiration of the year.

Proceeding to examine the record, in order to ascertain what judgment the district court ought to have rendered, we find the suit brought on promissory notes given by the defendant and appellant, to the plaintiffs and appellees, as executors, &c.

The defendant pleaded the general issue, and alledged he owes nothing to the plaintiffs—that, if he signed the notes, he has paid them—that they were signed through mistake, and he owed nothing to the plaintiffs, or their testator, at the time the notes bear date.

He made an unsuccessful appeal to the conscience of the plaintiffs, whose answers, to his interrogatories, establish the fact of his being indebted to their testator, at the time of his death. The statement of facts admits the signature of the defendant, at the foot of the notes, and no evidence was offered on his part.

His counsel contends, that the plaintiffs have

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URQUHARTS, EX'RS &C. vs. TAYLOR.

no right to sue, as it appears from the record, that the year allowed for the execution of the will, had elapsed before the inception of the suit.

We think that this exception cannot avail. The plaintiffs might have brought the suit, in their own names, as the promise was to them, though for the benefit of the estate, and the words *executors of &c.* are only a description of the persons of the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the plaintiffs recover from the defendant, the sum of $564 69, the amount of the two notes annexed to the petition, with interest at 6 per cent. from the 15th of November, 1804, on the sum of $347 69, and legal interest on the balance from the judicial demand till paid, with costs in the district court, and that the plaintiffs and appellees pay costs in this court.

Porter for the plaintiffs, *Brent* for the defendants.

FONTENEAU'S HEIRS vs. *PEROT.*

A question, the object of which is to obtain a general

APPEAL from the court of the sixth district.

In the year 1756, J. B. Piedferme presented

finding, both of the law and fact, cannot be especially submitted to the jury.

to the then commandant, at Natchitoches, his petition, asking permission to settle on a tract of land, which he describes as situated about nine leagues above that post, on the Red River, at a place called the Fayard, containing about eighty arpens, on the high land side of the river, unfit for cultivation, forming a *fer á cheval* from one high land to the other, and fit only for a cattle farm, for which he designed it. He prays a grant or concession of said land, together with fifteen arpens front on the opposite bank, for cultivation. This permission was given by the commandant—and in January, 1787, the governor-general of the province made an order of survey on the petition, directing the surveyor-general to lay out forty arpens only, in the place mentioned, with the ordinary depth, together with fifteen arpens on the opposite side of the river.

In the year 1795, Piedferme, the grantee, sold to Louis Fonteneau, the ancestor of the plaintiffs, the fifteen arpens on the cultivable side of the river, and on the opposite side on high land, at a place called the Fayard, a tract of land, bounded below by the landing of the vendor, and above by the bayou des carpes. In the deed of sale, he describes the land as having been acquired by concession from the Spanish

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government, under date of the 13th of January, 1787, *dont il transporte le titre au sr. acquereur.* After the purchase above recited, and during the lifetime of Fonteneau, the defendant, Perot, settled on the river, about forty arpens above the landing mentioned in the sale. Two or three arpens above his house is a bayou, now generally called the bayou des carpes, but said to have been known formerly by the name of the bayou du potraire. At the distance of about four or five arpens from the landing, near where the high lands recede from the river, is the bed of another bayou, said to have been known formerly by the name of the bayou des carpes. This suit was instituted to get possession of the land occupied by Perot, the defendant, as included in the purchase of their ancestor from Piedferme—before the trial in the court below, the parties submitted questions of fact to the jury, to have their special finding thereon, according to the statute of 1817.

The defendant, on his part, submitted the following questions, to wit:

1. How far is the bayou des carpes from the landing of Piedferme?

2. If there be several bayous des carpes, which is the one referred to in the plaintiff's title?

3. Was not the upper bayou known by the name of the bayou du potraire?

4. How far is it from the landing?

5. Were not the surveyors, under the Spanish government, bound, in case the commandants had not given sufficient room to place all the settlers with parallel lines and right-angled boundaries, to follow the course of the river, to establish the front of each, and divide the points, to apportion their respective depths?

6. Is the defendant on the land claimed by the plaintiffs?

7. Was the possession of the defendant in good faith, and what is the value of his improvements?

8. Where is the place called the *fer á cheval*?

9. Has the defendant any title to the land in dispute, and in what words is it expressed?

10. Does the plat of survey, marked B, correctly represent the bends of the river and the adjacent lake?

The facts submitted on the part of the plaintiffs, related solely to their written titles.

The defendant offered evidence to shew, that the bayou referred to in the plaintiffs' title is at the distance of only four or five arpens from the landing or lower boundary there described; that

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FONTENEAU'S HEIRS vs. PENOT.

the upper bayou was known at that time by the name of the potraire, and generally to shew the local situation and extent of the plaintiffs' purchase. This evidence was rejected by the court, and all the facts submitted were stricken out, except the 9th and 10th, and the jury limited to a finding of the written titles. To this the defendant's counsel excepted, and judgment being entered in favor of the plaintiffs for the whole forty arpens, an appeal was taken to this court.

Baldwin, for the plaintiffs. The plaintiffs in the court below, now appellees, claim the whole extent of land granted to Piedferme, under the purchase of their ancestors. That grant was for forty arpens front on the river, with the ordinary depth at the Fayard. The deed from Piedferme to Fonteneau, to give a more clear description of the land, describes it as extending from the landing of the vendor, to the bayou des carpes, but does not specify the number of arpens. The bayou known by that name, at the distance of about forty arpens above, must be taken to be the one referred to in the deed. If the descriptive part of the deed leave any doubt as to the intention of the parties, and extent of the purchase, what follows,

fully explains it. It goes on to say, that the land thus sold, came to the vendor by concession from the Spanish government, dated the 13th January 1787 "*dont il transporte le titre au sr. acquereur*". This expression then clearly proves, that no reservation was made, and that it was the intention of the vendor to part with his whole interest in the forty arpens front, together with the fifteen on the other side. The court below, therefore, did right in rejecting parol evidence, which would go to vary or alter in any degree, the written title of the plaintiffs, and in striking out those facts which could only be established by a species of evidence, in its nature inadmissible.

But the defendant is forever estopped and precluded from contending, that the ancestor of the plaintiffs acquired less than forty arpens, by his own act. In 1807, the present defendant accepted a conveyance of a tract of land from Adley, which is by the deed, declared to be bounded below by the forty arpens of Fonteneau. Recitals in authentic instruments, are full and conclusive evidence between the parties, and cannot afterwards be denied or gainsaid by them, 2 *Poth.* 82.—The defendant having purchased lands, bounded below by the forty arpens of Fonteneau, shall not now be admitted

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to say, that he had less than that quantity, and thereby change the location of his own purchase. The judgment ought therefore to be affirmed.

Bullard and *Murray*, for the defendant.—This case comes up on two bills of exceptions, to the opinion of the court below. In rejecting parol evidence to shew the extent and boundaries of Fonteneau's purchase, and in striking out certain facts submitted to the jury by the defendant for a special verdict.

The only question for the consideration of this court appears to be, whether the facts thus stricken out or any of them, were pertinent and proper, if so, the court erred in striking them out, and in rejecting the only kind of evidence by which they could be ascertained or established. By reference to the deed from Piedferme, to Fonteneau, it appears that the land conveyed on the highland side of the river, is described as laying between the debarquement of the vendor, and the bayou des carpes. It is contended on the part of the defendant, that there is much less than forty arpens between these given points, and that it does not embrace the plantation of the defendant. It becomes therefore important, to ascertain the precise distance between these boundaries. The first fact there-

fere was material, pertinent and proper, and the court erred in rejecting it.

But it is said that there are two bayous, known by the name of the bayou des carpes, and the plaintiffs contend, that the upper one must be assumed to be the one referred to in the deed, in as much as it is at the distance of about forty arpens from the landing. To this it may be answered, that if there be two of the same name, it is an ambiguity in the deed, arising from facts or circumstances foreign to the deed, and may be explained by parol evidence. *Phillips*, 140. The court therefore erred in striking out those questions of fact which relate to that point, and generally in rejecting parol evidence to establish the extent, boundaries and local position of the purchase of Fonteneau.

It is further asserted by the plaintiffs' counsel, that their title papers contain intrinsic evidence, that their ancestor acquired by purchase from Piedferme, the whole of his original grant, and that the expression used in the deed, "*dont il transporte le titre*" necessarily, *ex vi termini* implies it. To this it is answered, that the delivery or transfer of the title papers, amounts to nothing more, than a species of tradition of the thing sold, and as furnishing to the vendee a proof of title in the vendor, but can never be

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construed to convey a greater interest than is clearly expressed and stipulated in the deed of sale, between the parties, by a legal construction of which, their intentions are to be ascertained. *Civ. Code*, 350, *art.* 29.

Nor ought the defendant to be precluded, or estopped from saying that Fonteneau acquired less than forty arpens, from the circumstance of having accepted a conveyance from Adley, by which it is recited or declared that the land sold, was bounded below by the forty arpens of Fonteneau. The authority cited from Pothier, declares, that recitals in deeds, are final and conclusive between the parties only, when the recitals have a reference to the disposition. It is difficult to conceive, what reference the recital above mentioned, has to the dispositions of the act of the parties. It relates neither to the quantity or extent of the land sold, nor to the chain of title, nor to the warranty; and neither of the parties at the time, had any interest in opposing a recital so totally irrelevant. It would appear extraordinary if the plaintiffs could patch up a defect in their own title, by relying on a deed to which neither they nor their ancestor were a party.

MARTIN, J. delivered the opinion of the court.

The first four questions, having the same object, viz. to ascertain the situation of the bayou, which is given by Piedferme in his deed of sale, to the plaintiffs' ancestor, as the upper limit of the land sold, may be considered together.

In the description of the land sold, with regard to its contents and situation, the defendant contends that two points only are mentioned: the landing and the bayou. The first is not disputed: nothing seems therefore to remain, but to ascertain the second. It cannot be denied, that the first four questions lead to the discovery of this *desideratum*. If so they must be pertinent to the issue, and the judge erred, in striking them out.

He assumed it as an uncontroverted fact, that Piedferme had transferred to the plaintiffs' ancestor, all his right and title to the whole of the land granted him by the Governor General: and this says the court "because the deed does not express it as part of his claim, or *part* of his grant, but generally and without limitation, the *claim or grant*, which he obtained from the Spanish government." The price or consideration is taken as conclusive evidence, that he did not purchase the small quantity of land only, which is included within the boundaries described in the deed. The transfer of the pa-

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FONTENEAU'S HEIRS *vs.* PERROT.

per title, by Piedferme to his vendee, is taken also as conclusive evidence (at least with what precedes) of an intention of parting with the whole land granted.

Admitting the correctness of this mode of reasoning, which we are not prepared to, and which it is unnecessary that we should do, our inquiry will be materially aided, by a knowledge of the situation and relative distance of the only two points, by the aid of which, the vendor and vendee appear to fix the situation and contents of the land sold.

The fifth question appears to be a question of law, which the judge properly withdrew from the jury.

The sixth appears also to have been properly withdrawn, as the object of it was to obtain a general finding of the law and fact, which cannot be asked as a special one.

It may be important, in case the plaintiffs support their allegations, and damages be assessed, that the defendant should shew a *bona fide* possession, and as the value of his improvements may likewise, with propriety be considered, we therefore think the district judge erred in striking off the seventh question.

The place called *fer a cheval*, being referred to in the title papers, the defendant ought to be

indulged in the desire which he manifested, of having its situation correctly ascertained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the cause be remanded for trial, with direction to the district judge, to reinstate and submit to the jury, all the questions of fact striken out, except the fifth and sixth.

Baldwin for the plaintiffs, *Porter* for the defendants.

DUNCAN & AL.'S SYNDICS vs. *MARTIN & AL.*

APPEAL from the court of the sixth district.

A bill of exceptions, to the opinion of the court in refusing a conditional verdict, will not be noticed if the whole evidence comes up, and the supreme court is enabled thereby finally to dispose of the case.

MATHEWS, J. delivered the opinion of the court. A bill of exceptions was taken to the opinion of the court *a quo*, in refusing to receive a conditional verdict presented by the jury, to whom the cause was submitted, and instructing them to reconsider the matter, and render such verdict as they thought proper, for the plaintiffs or defendants, without any qualification or condition annexed to their finding. As the whole

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evidence in the case comes up with the record, it is useless to give any opinion on the bill.—*Abat* vs. *Dolliole* 4 *Martin*, 316.

The question in the case, is one of fact, viz. whether J. Ryeson was the agent or attorney of the plaintiffs and appellees, and vested with power to compromise, settle and discharge their claim against the defendants, in any other manner than by receiving payment. From a view of all the evidence, this court is of opinion, that he had not authority to bind his constituents, in any other manner than by acquitances and receipts to their debtors, for payments actually received to their use, or acknowledged to have been received.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, be affirmed with costs.

Porter for the plaintiffs, *Baldwin* for the defendants.

BREAUX vs. *MEAUX*.

If the preceedings on which a judgment pleaded in bar, be so confuse, that

APPEAL from the court of the fifth district.

MATHEWS, J. delivered the opinion of the court. This is an action of trespass, instituted

by the plaintiff to try the title to a tract of land claimed by both parties, and of which each states himself to be in possession, under a legal title.

The defendant further pleads the general issue, and *res judicata*, averring, that "all matters and things alledged against him have been finally and fully decided in the superior court of the late territory of Orleans."

the facts cannot be well ascertained, the case will be tried on its merits.

There was judgment for the defendant—and the plaintiff appealed.

The correctness or error of the judgment of the district court depends on the pleadings and decision, in the case pleaded. On examining the judgment, it appears grounded on a petition of the heirs of the late R. Trahan and Firmin Breaux, admitted to be the ancestor of the plaintiff, in which they pray to have a decree of a Spanish tribunal, rendered whilst this country was under the dominion of Spain, executed. By the judgment of the superior court, we are referred to the Spanish decree, and consequently to the proceedings on which it is grounded. They exhibit such a confused mass, that it is almost impossible to discover what was the point in contest between the original parties. Confining ourselves to what is contained in the Spanish decree, and the judgment of the superior court, so far as they go to fix the limits of the

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land in dispute, nothing seems to have been expressly decided, except that the island of Copalm is the upper limit of forty arpens in front on the bayou Vermillion, granted to Rene Trahan, on the western side of said bayou, and a place, called the *Coulee des Porches*, its lower limit on the eastern side. Some grants are declared to be null and void, which have no relation to the dispute between the present parties. The judgment of the superior court then concludes, with an order to the sheriff to put the complainants in possession of their respective tracts, in conformity with a survey and establishment of limits, as decreed by the Spanish tribunal.

Now, the limits so established, from any thing that we have been able to find in the record, do not appear to have been clearly and definitively ascertained, except as to Trahan's land. It is possible that the adjoining tracts may, on investigation, be found to be governed, in their limits, by those fixed for Trahan's. But this, in our opinion, does not sufficiently appear, in the proceedings of the former suit, to preclude the plaintiff from an examination of his case on the merits.

It is, therefore, ordered, adjudged and de-

ceed, that the judgment of the district court be annulled, avoided and reversed, and that the case be remanded for trial on the merits.

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Baldwin for the plaintiff, *Porter* for the defendant.

RUTHERFORD vs. *COLE.*

APPEAL from the court of the sixth district.

A creditor of a party to a suit, who has not established his claim below, cannot exercise his debtor's right of appeal.

MARTIN, J. delivered the opinion of the court. The plaintiff, as mortgagee of a tract of land of the defendant, had it sold under an order of seizure. Donaldson, who states himself to be a posterior mortgagee of the same tract, presented a petition of appeal to the judge, who had granted the order, in his own and the defendant's name, before the payment of the money. The appeal was granted: but the defendant hearing of this forwarned the clerk of this court from receiving the record, as he wished no appeal, and had not authorized the use of his name. The clerk having accordingly declined to receive it, a motion is now made for our direction to him to receive and file it.

The attorney, whose name appears at the bottom of the petition of appeal, candidly admits,

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he was not authorized by Cole, to pray for the appeal, but that he asked it on behalf of Donaldson only.

He contends, that Donaldson is a creditor of Cole, and has a right to exercise all the rights and actions of his debtor, except those which are exclusively attached to his person. *Code Civ.* 262, *art.* 66.

On the part of the plaintiff and appellee, it is contended, that this court cannot receive any evidence, except that which comes up with the record—that the applicant does not thereby appear to be a creditor of Cole, except from his own naked assertion—that Cole, not being a party to the record, the pretentions of the appellant cannot be safely admitted or contested by the appellee.

We are of opinion, that it would be idle in us to look into any voucher, by which the applicant might endeavour to establish his claim on Cole, in whose absence, we cannot recognize him as a creditor.

The applicant cannot take any thing by his motion.

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The appellee cannot bring up the transcript of the record.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff obtained a judgment in the district court, and the defendant prayed an appeal, giving bond and security, in order to stay the execution. The appeal was made returnable to the first day of this term. The record was brought up, by the plaintiff and appellee, who had been cited to appear here.—The clerk deeming it improper to receive a record, which was not brought up by the appellant, this court is moved for an order, that it may be received and docketed.

The 10th section of the court law of 1813, makes it a duty of the appellant, to return the petition of appeal, and the transcript of the proceedings on the return day thereof, in the supreme court, and it provides that, on the filing of these papers, the adverse party may appear and answer.

The 9th makes it the duty of the clerk of the district court, to make a transcript, to be delivered to the appellant, and provides, that if the latter does not prosecute this appeal, (in

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the manner described by the act) the appeal bond may be delivered to the adverse party, to be put in suit.

The third section of the supplementary act directs, that where an appellant should not prosecute his appeal, within the delay fixed by law, the adverse party may, on proving the fact, obtain from the district court an order of execution of its judgment, without prejudice to his right on the bond.

It is clear from the above, that the appeal, after it has been granted, and the bond with security given, must be *prosecuted* by the appellant, and that the appellee is not to appear and answer, until the appellant so far prosecutes the appeal, as to file the transcript. For the appellant's failure to prosecute the appeal, the law at first provided no other penalty, than the forfeiture of the bond: but the supplementary act gives to the appellee, the faculty of taking out execution, on adducing proof of the neglect to prosecute.

But the appellee contends that, unless he be permitted to bring up and file the transcript, he cannot obtain from this court, the damages and interest, not exceeding ten per cent, which the court may think a sufficient compensation, for the loss and prejudice, which he may have

suffered, in consequence of the appeal. These damages cannot be given, except on an affirmance of the judgment, and this affirmance cannot take place, if the appeal be not presented.

In the western circuit, the defendant, by praying and failing to prosecute his appeal, may delay the payment of his debt, for nine or ten months, without the risk of the damages, which the court may allow, in affirming the judgment. This is certainly an evil, but it is such a one, to which the legislature alone is competent to apply a remedy. We are not authorized, in order to avoid it, to devise the means of prosecuting an appeal by the appellee—of directing the mode, time &c. of his bringing the appellant before us. The transcript of the record, being brought by the appellee, cannot be received.

PREVOT & WIFE vs. *HENNEN.*

APPEAL from the court of the fifth district.

The seizure of real estate, on a *fi' fa'*, divests the defendant from the legal possession of it.

In the year 1814, some person, not connected in the present cause, sued Prevost, the husband, recovered judgment, and obtained execution.

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The sheriff thereupon seized a house and piece of land, as the property of Prevost, and proceeded to make the appraisement. This being done, and no opposition whatever made to these proceedings, he sold the property seized to the present defendant. Henrietta Borel, wife of Prevot, however, obtained and kept possession of the premises—in consequence of which the defendant requested the sheriff to put him in possession, who thereupon summoned the *posse comitatus*, and did actually put him in possession. The house being of no use to the defendant, and the materials, in his estimation, not worth taking away, he caused it to be burnt. Henrietta Borel afterwards claimed the premises as her own private property; brought a petitory action, and recovered it by a judgment of the supreme court. 4 *Martin*, 506. And on the 18th of March, 1816, about eighteen months after the alledged trespass had been committed, she brought her action for damages, not against the sheriff, but against Hennen, and did in fact get a verdict for $2000. On a motion for a new trial, this verdict was affirmed, and judgment thereupon rendered: he appealed.

Workman and *Hennen*, for the defendant. The first circumstance that appears extraordi-

nary in the proceedings in this case, is the enormity of the damages. Two thousand dollars have been awarded as an indemnification for a trespass on a property which was sold for the sum of $333 67.

The jury, which could give such a verdict, must have been actuated by a spirit very different from that of justice.

It is equally remarkable, that during the whole of the proceedings, previous to the sale of the property, no claim was interposed, no opposition made by Madame Prevost, or by her husband, in her behalf. When a sheriff seizes property, by mistake or otherwise, which he has no right to take, common sense immediately suggests to the owner to make his claim without delay. If he neglects this obvious precaution, he virtually waves his right as to the injury, trespass or tort, and retains his right to the property only—for, in strictness, there is no tort or injury, unless where there is an intention of injuring. How can a sheriff be considered as a wrong doer, for taking property which he believes he has a right to take, and which the owner suffers him to seize and to appraise, without making any claim, complaint or expostulation?

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In England, and in the United States generally, when the sheriff makes an illegal or erroneous seizure of goods, the owner of them, if the sheriff persist in the seizure, has no other remedy but to bring his action of trespass. But in this state, the law has provided an immediate and summary remedy, which is very generally known and very frequently enforced. When property is seized for a debt, a third party who affirms that the property belongs to him, or that he has any right in it, may make opposition to the execution, and the judge shall take cognizance of this opposition, in a summary manner. *Part.* 3. 27. 3.

The mode of making, and the proceedings in, such opposition, are briefly stated in the *Curia Filippica, part.* 2, *Juicio executivo.—part.* 26, *tercero opositor.* From which the following extracts are submitted to the court.

No. 4. "*Esta oposicion se puede, y ha de hacer, y admitir en qualquier tiempo durante la causa executiva, aunque sea despues de la sentencia de remate, como sea antes de dada la possession, o hecha la paga.*"

The words of the law, be it remarked, are imperative as well as permissive. The intention of the legislator evidently being to prevent expensive, circuitous and unnecessary law suits.

The 7th number of this section provides for the very case in which Madame Prevot was placed: *Aunque la muger, durante el matrimonio, no puede pedir su dote y bienes al marido, que sin culpa suya viene en inopia, o pobreza,— empero puedelo pedir en esto câso, quando es executado a pedimento de otro acreedor, y oponerse a la execucion, &c. &c.*

The 18th number provides, that these oppositions, when necessary, shall be tried and determined by proofs in the ordinary mode of proceeding.

What is here quoted, is founded upon laws of the *Partidas*, and the *Recopilacions*, referred to in the book cited. Madame Prevot, having then neglected to use the means, and avail herself of the remedy given and prescribed by the law, what right has she afterwards to complain of an injury or trespass, which her neglect and silence alone occasioned? How was the sheriff to know, legally or officially, that the property in question did not belong to her husband, the defendant in the original suit? Did not the absence of any claim on the part of a third person, *tercero opositor*, justify him in presuming, that it really was the property of the debtor? Under such circumstances it is contended, that Madame Prevot can be entitled to no damages

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whatever, from any one, for the seizure of the premises; and that, having recovered back the property, she has got every thing which she can legally claim. If she had been refused her costs in the action, to which she had recourse for recovering it, that loss would have been only a just penalty, for having preferred a tedious and expensive litigation, to the cheap and summary process, which the law has provided, and which would have secured her from all inconvenience in the first instance.

This argument is strengthened, when the relation between Madame Prevot, and the defendant in the original suit is considered. He, as her husband, was the administrator and protector of her property. He might therefore very naturally be considered in the neighbourhood, as the owner of the estate. He was at least, the apparent owner of it. The sheriff, then was justified in taking it at first, and in proceeding to the sale of it, as long as no legal opposition thereto was made. The silence of the parties up to this stage of the proceedings, gives strong reason to suspect some collusion. They thought perhaps, that by allowing the seizure and sale to proceed thus far unopposed, the actual property of the debtor would be secure from seizure, and that in the mean time,

he might place it out of his creditors' reach, by some of those ingenious stratagems, of which debtors of a certain class so well know how to avail themselves.

How was the sheriff to act, the sale having been thus suffered to proceed, unopposed to its last stage? We maintain, that it was his duty to put the purchaser in the possession of the property; for, at any time previous to the possession being given, the third opposer may make his claim in due form of law. No such claim having been made, it was fairly presumable, that no right to it existed, and this being a case in which it appears that resistance was made, or threatened, it become the sheriffs' duty "to call for the aid, and command all the people of his country to attend him, and enable him to keep the peace, and execute the process of the court, that was directed to him." 1 *Bl. Com.* 362, *Dalt. Sher.* 5.

As to the notion entertained by the judge, and stated by him to the jury, that all those who assisted the sheriff in this proceeding, were trespassers, it seems to be quite erroneous. It was the duty of all those able bodied inhabitants of the country, whom the sheriff called to his aid, to obey his summons. The statute of 1805, for establishing the county courts, went

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so far as to declare, that "every person, so called, by any sheriff, who shall refuse to render such assistance, may be punished by fine, at the discretion of the court, not exceeding $25. 1. *Orl. Laws* 194," And it would have been a most absurd anomaly in our jurisprudence, if a man could be held liable as a trespasser, for doing that which by law he was bound to do, and for refusing to do which, he would be subject to a legal penalty. The provision just quoted of the county court act, has, it is true, been repealed; unintentionally or inadvertenly, as we apprehend:—for the duties of the sheriff continue the same as before. But though the specific penalty be in consequence abolished, we contend that the sheriff's authority to call for the aid of the *posse comitatus*, still remains in full force. It is still made the duty of the sheriff of each parish "to execute all judgments and orders of the district court &c,—and to discharge all the duties which were incumbent on the sheriff of the parish, and superior court." (see act to organize the supreme court, *s.* 23.) It is enacted in the 16th sect. of the same statute, that the proceedings of the district courts, shall be governed by the acts of the territorial legislature, regulating the proceedings of the late supreme (superior) court

of the territory of Orleans. Now, by the 14th and subsequent sections of the act, regulating the practice of the said superior court, *Orl. Laws*, 1. 236, the sheriff's duties in making seizures and sales, are the same, and prescribed nearly in the same words, as they were under the county court act. His powers, therefore, so far as they are requisite for the execution of those duties, must continue—for it is a well known, undoubted principle of law, that whenever any duty is imposed, or any authority given, the means necessary to the performance of the one, or the execution of the other, are impliedly, if not expressly, accorded. What these means are, in cases like that under consideration, must be found in that system of jurisprudence, conformably to which the office of sheriff was created. Under the free system of the common law, the sheriff would naturally have recourse for aid to the good people of his county, in the same manner as the Spanish alguazil mayor would demand assistance from the military power. The office of sheriff is provided for, and the mode of appointment to it regulated by the constitution of this state—whence it may be inferred, that the nature, the duties and power of that office were generally recognized and understood as they are, and al-

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ways have been, from similar provisions in the constitutions of several of the other states of the union; that is, according to the principles and usages of the common law. Repeated adjudications of the supreme courts of Massachusetts and Connecticut authorize this presumption. *Backus' Sheriff Adv.*

With the legality of the process, or proceeding of the sheriff, in such a case as the present, the *posse comitatus* have nothing to do. It is quite enough for them to know that he is the sheriff, and that what he is doing is apparently just: otherwise who would ever venture to obey the sheriff, when called upon to execute the law? The following authorities on this point go very far beyond what we require:—"If J. S. be compelled by J. N. to commit a trespass, the latter only is liable—for no person can be guilty of a trespass, unless he act voluntarily." 6 *Bac. Ab.* 589. "If a stranger have officiously assisted a sheriff or his officer in the execution of a writ of *fi' fa'*, which issued upon a regular judgment, he is not liable to an action of trespass—for it is not only lawful, but it is the duty of every man to assist in the execution of such a writ." 6 *Bac. Ab.* 590.

These considerations would serve to exonerate the appellant and protect him against this

action, if it were even in proof that he had personally assisted the sheriff, as one of the *posse comitatus*, or even as a stranger. But the statement of facts does not go that length. It is there declared that the defendant was asked to join the *posse*—but he objected to going with them, giving as his reason that, as he was the purchaser, it would be improper in him to do so.

Much stress appears to be laid by the judge below, in the bill of exceptions, on the circumstance that the sheriff put Hennen into possession of the premises—which, it appears from the said bill of exceptions, he had before seized and sold to him, without any warrant or authority, save only the writ of *fi' fa'* aforesaid. And what other authority or warrant, we ask, was requisite? In fact, our laws have provided no other. That writ enables the sheriff to seize the property—and having so seized, and being in lawful possession of it, he sells it and delivers it up to the purchaser. What need of a writ of seizure, or of possession, when the sheriff himself is already in possession of the property? This throws a new light on the affair, and clears up all difficulties. It was Madame Prevot who was the transgressor in this case. She, it seems, obtained possession, by some means or other, of that property, which the

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sheriff had seized and sold, as the record itself states—and it was only in consequence of this unlawful possession acquired by her, that the sheriff was obliged to have recourse to legal violence to eject her from the premises. Had she, when the property was first seized, previous to the sale, made the legal opposition of a third party, she would of course have recovered the possession. But, having neglected to do so, she was to be considered an intruder and trespasser.

The sheriff having sold the property, as the statute directs, made the tradition and delivery of it in the manner prescribed by law. Tradition, or delivery of immovables, is made by the seller, when he leaves to the purchaser the possession of the same, by dispossessing himself, &c. or by putting the buyer on the premises. *Civ. Code*, 351, *art.* 28.

Hitherto our argument goes to the complete exculpation of all the parties concerned in this supposed trespass of the sheriff as well as the defendant. But, whatever may be the liability of the former in this transaction, it is clear, beyond all doubt, that the latter must be regarded as a peaceable, legal, *bona fide* possessor. His case comes exactly within the definition of the *bona fide* possessor, as given by our statute.

The possessor, in good faith, is he who is, in fact, the master of the thing which he possesses, or who has a just cause to believe that he is so, although it may happen that he is not; as it happens to him who buys a thing which he thinks belongs to the seller, and which yet belongs to another. *Civ. Code*, 478, *art.* 21.

The sale of the property by an officer authorized by the state to make such sales, was quite enough to justify the defendant in believing that the title was a good one—that the property did in fact belong to the debtor, and, by operation of law, to the sheriff who had seized and sold it. If any thing more was necessary to confirm him in this belief, it would be found abundantly in the absence of all legal opposition to the sale. Such a possession as this would serve as a foundation for the prescription of ten or twenty years.

It is, therefore, sufficient to defeat this action of trespass, or any other action, founded on a supposed tort or injury. In such cases, the maxim of our law is, that "good faith is always presumed, and that it is for him who alledges bad faith to prove it." *Civ. Code*, 489, *art.* 71.

Bonæ fidei emptor (says the Roman law) *esse videtur qui ignoravit rem alienam esse,*

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aut putavit eum qui vendidit, jus vendendi habere. ff. de verb. significatione.

Con buéna fé, (says the Spanish legislator) *recibe el que succede a otro, o' cree que el que le entrega la cosa tiene potestad de entregarla,* &c. *Part.* 7, 33, 9 *Compendio por Perez,* 41.

But, if the seizure made by the sheriff, were wholly illegal and without any colour of justice, still this action could not be maintained against the defendant. The sheriff alone would be liable to it. On this point, the authorities are very full and decisive. *Celui qui a été dépossedé par violence, n'ést pas fondé à exercer cette action de reintegrande, contre celui qu'il trouve en possession de la chose dont il a été dépossedé par violence, si ce possesseur n'y a aucune part.*" *Poth. Poss. n.* 122.

Cum a te vi dejectus sim, si Titius eandem rem possidere cœperit, non possum cum alio quam tecum interdicto experiri. If you have dispossessed me by violence, and if another, *(Titius)* have began to possess the same property, I cannot obtain the same interdict *unde vi,* except against you alone. *ff.* 43, 16, 7.

The interdict *unde vi* is here spoken of: *Istud interdictum unde vi non datur contra particularem successorem; unde si ille qui commisit violentiam, vendidit vel donavit alteri illam*

rem, vel quovis alio titulo oneroso, vel lucrativo, per contractum inter vivos, vel per ultimam voluntatem, aliænavit, non poterit primus possessor expulsus agere hoc interdicto contra illum tertium particularem successorem, sed tantum contra expulsorem qui violentiam commisit, licet rem ipsam non possideat. Gomez. Comment. in leg. 45, Tauri, n. 186. Cujus ratio est, (he adds) *quia regulariter interdicta sunt remedia personalia. ff. 43, 1.*

The plaintiff having brought her action of trespass, in the common law form, it may be proper to shew, that the principles of that system of jurisprudence, are as little favorable to her claim, as those of the Roman or Spanish laws. To be able to maintain an action of t espass, says *Blackstone, 3 Com.* 210; one must have a property (either absolute or temporary) in the soil, and actual possession by entry.

If the sheriff, or a stranger illegally take the goods of another in execution, and sell and deliver them to a third person, trespass cannot be supported against the latter, because they came to him without fault on his part. *1 Chitty's pleading,* 170. The *gist* of this action is the injury to the possession; and unless at the time the injury was committed, the plaintiff was in ac-

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tual possession, trespass cannot be supported. *Idem.* 175.

There is a material distinction between personal and real property, as to the right of the owner. In the first case we have seen, that the general property draws to it the possession, sufficient to enable the owner to support trespass, though he has never been in possession; but in the case of land and other real property, there is no such constructive possession: and unless the plaintiff had the actual possession, at the time when the injury was committed, he cannot support this action." *Idem*, 176.

"Thus, before entry and actual possession, a person cannot maintain trespass, though he hath the freehold in law, &c. But a disseisee may have it against a disseisor, for the disseision itself, because he was then in possession; but not for an injury after disseisin, until he hath gained possession by re-entry," &c. *Idem*, 177.

There must be a possession in fact, of the real property to which an injury is done, in order to entitle a party to maintain trespass, *quare clausum fregit.*" 6 *Wilson's Bac. Abr.* 566, 1 *John. Rep.* 511. 9 *John. Rep.* 61.

These authorities, which might be multiplied without end, 6 *Bac. Abr.* 593, 3 *Caines*, 261,

Buller's, N. P. 87, 1 *Lord Raym.* 692, 2 *Salk.* 639, *Co. Litt.* 257, 13 *Coke*, 500, 2 *Lord Raym*, 975, 1 *Leon.* 302, 319, 1 *Gould. Esp. N. P. part.* 2, 266, 9 *John. Rep.* 61, &c. &c. all prove that, if Madame Prevot had an action of trespass, it was against the sheriff, and not against the defendant. But, setting aside the name, and particular form of the action, his substantial and irrefragable defence, in law and in natural equity, is that, as he entered into the possession of the property in perfect good faith, having nothing whatever to do with the original suit, he cannot be liable to any manner of suit or prosecution as a wrongdoer.

There is yet another legal defence, of which he can avail himself, and which, independent of all others, would be sufficient to defeat this action, now and forever, as against the defendant and all other persons. It is the plea of prescription—a plea or exception which our law permits to be offered in every stage of a cause, even on the appeal. *Code Civ.* 483, *art.* 36. Such is the Roman, Spanish and French law. *Prescriptionem peremptoriam, quam ante contestare sufficit, omissam priusquam sententia feratur, objicere quandoque licet.* The peremptory exception, which might be well pleaded previous to the contestation of suit, may, al-

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though it should have been then omitted, be afterwards opposed, at any time before the sentence or decision of the cause is given. *Cod.* 8, 36, 5.

Cum nundum finitam sententiam, sed dilatam allegatis; non est dubium omnes integras defensiones vobis esse.

When the cause has not been decided by a final sentence, but continued, there is no doubt but that all kinds of defence remain to you in their integrity. *Cod.* 8, 36, 4.

Il est de la nature de l' exception peremptoire, de pouvoir être opposée en tout état de cause; et telle est la prescription. 8 *Droit Romain de Le Clerq*, 63.

On ne doute pas que la prescription ne puisse être proposée en tout état de cause. C'est une exception peremptoire, et cela dit tout. Aussi trouvons nous dans le Journal du Palais de Toulouse, 2 *tom.* 552, *deux arrêts de cette cour qui jugent que le possesseur est tenu à prouver la possession du tems legitime pour la prescription, quoiqu'il ait commencé à se defendre contre l'ancien proprietaire, qu'il ait d'abord pretendu simplement que la chose lui appartenait independamment de la prescription, et sans l'avoir proposée au commencement de l'instance.* 9 *Merlin*, 489. See also 8 *Le Clerq*,

Droit Remain, 63, *Cod.* 8, 36, 8, 2 *Domat*, 226, *F. Ed.*

The period of prescribing against this action remains to be shewn.

The wrong complained of by the plaintiffs, is called, in our technical law language, an injury. This word includes not only every species of libel, slander and calumny, but all acts of violence for which damages may be recovered in a civil action. It comprises all those torts which the common law desiguates by the names assault, battery and trespass, *vi & armis*. *Generaliter injuria dicitur omne, quod non jure fit. Inst.* 4, 4, *pro.*

Injuria ex eo dicta est, quod non jure fiat; omne enim quod non jure fit, injuria fieri dicitur. 1 *Dict. Dr. Rom.* 395.

Injuria autem committitur, non solum cum quis pugno pulsatus, aut fustibus cæsus, vel etiam verberatus erit; sed it si cum convitium factum fuerit; sive cujus bona, quasi debitoris, qui nihil deberet, possessa fuerint, ab eo qui intelligebat nihil eum sibi debere. Inst. 4, 4, 1.

An injury is committed, not only by beating, scourging or whipping, but also by using slanderous language; or by seizing the goods of another, as if he were a debtor, when the per-

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son seizing them knew that nothing was due to him. *Inst.* 4, 4, 1.

The punishment of an injury was by retaliation, according to the law of the twelve tables, when a limb was broken; but, in lighter cases, the punishment was pecuniary. Afterwards, the prætors allowed the parties injured to lay their damages at a certain sum, which might serve as a guide to the judge in estimating them according to his discretion. And this was the mode universally resorted to when the civil action of injury was brought. *Inst.* 4, 4, 7. This action corresponds, in the present case, with the common law action of trespass *vi & armis*, as the action of trespass on the case corresponds with many of the actions given by the Aquilian law. But the right to bring the former (the action of injury) is limited to one year. *Hæc actio dissimulatione aboletur; & ideo, si quis injuriam dereliquerit, hoc est, statim passus ad animum suum non revocaverit, postea ex pœnitentiâ remissam injuriam non poterit recolere. Inst.* 4, 4, 12. *Injuriarum actio annuo tempore præscripta sit. Cod.* 5.

This provision is adopted by the Spanish law. *Hasta un ano puede todo ome demandar emienda de la deshonra, o' del tuerto que recibió; e si un ano passasse desde el dia que le*

fuesse fecha la deshonra, que non demandasse en juizio emienda della, de alli adelante non la podria fazer: porque pode ome asmar que se non tuvo por deshonrado pues que tanto tiempo se cálló, que non fizo ende querella en juyzio; ó que perdonó ó acquel que gela fizó. Part. 7, 9, 22.

During the period of a year, every man may demand compensation or satisfaction for the injury or wrong which he has received. But if a year have passed from the day when the injury was done to him, without his having demanded, judicially, satisfaction therefore, from thenceforth he may not make such demand; for it may be considered that a man does not hold himself to be injured, who has been so long silent, and has made no complaint thereof in justice; or that he has forgiven the person who has done him the injury.

Gregorio Lopez, in his glossary on this law, notices the opinion of some doctors, who maintained that a man was bound conscientiously to make reparation for injuries committed by him, even though the injured person should not bring an action within the year—and that, if he failed to make such reparation, he was liable to be excommunicated. But the best casuists, it seems, decided, *quod per lapsum anni est sublata actio*

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injuriarum, et obligatio civilis & naturalis adeo quod tacendo per annum, videtur injuriatus remisisse omnem injuriam.

Our statute prescribes the same period for the action of one who has been disturbed in his possession. He, who pretends to have been interrupted in his possession, ought to make his demand or complain thereof within a year, to be reckoned from the day of his being turned out of possession. For, if he leaves his adversary in possession for the space of a year, he has lost his own possession, whatever apparent right he may have had to it: but he retains his action for the property. *Code Civ.* 481, *art.* 27.

L'action de reintegrande, lorsqu'elle est poursuivie au civil, doit, de méme que la complainte, être intentée dans l'année, laquelle se compte du jour que la violence a cessé et que le spolié a été en pouvoir de l'intenter. Cela ést conforme aux principes du droit romain. Dig. 43, *t.* 16. *Si donc on a laissé passer l'année sans intenter cette action il resulte de ce laps une fin de non recevoir contre cette action qúon voudroit intenter après l'année. Pothier. L'action en complainte est egalement annale. Merlin,* 550.

The lapse of time, then would have converted the appellant's possession of the premises,

had it been even at first obtained by violence on his part, into a legal possession; and therefore the action grounded on that violence could no longer be maintained.

If it be attempted to distinguish the action for recovering possession, from the action of injury for the disseisin, then we rely on the law already quoted of *Partidas*. A law not repealed, altered or modified,—as respects civil suits, by any statute of this state. Our civil code is silent on this particular subject: it regulates the periods of prescription in various cases, leaving the others as before its promulgation. The 65 *art. p.* 486, provides, that after thirty years, all actions, either personal or real are prescribed against. But this provision is evidently intended to apply to actions only, for which, the period of prescription is not otherwise fixed. In other parts of the same code, different times of prescription are specified. In an antecedent part of that code, *sec.* 2, *ch.* 5, of the title of sale, it is enacted (367, *art.* 115) that, "*l'action pour se faire restituer pour lesion d'outre moitie, doit etre exercée dans les quatre ans.*" This provision, it is well known, has not been affected by the subsequent clause, declaring that all actions are prescribed against after 30 years. But the law of the *Partidas*

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stands in the same degree of authority, as if it had been ordained on the day before the civil code was promulgated, or, as if it were found in that code itself, immediately preceding the article of the thirty years prescription. And it has been already determined, after many solemn arguments, that the provisions of that code or digest, are to be taken, and construed along with the previously existing laws on the same subjects, as statutes made *in pari materia*, the whole to remain in force, if not incompatible with each other. In an action for slander, the prescription, here contended for, was admitted by the superior court, of the late Territory of Orleans;—subsequently to the promulgation of the civil code. In the action now before the court, the term of prescription is precisely the same, viz. one year from the day when the injury, or trespass, was committed. If this prescription were considered repealed, as incompatible with the above mentioned 65*th art.* of the *civ. code, p.* 486, so must every other prescription, provided for by the preceding titles of that code, or by any antecedent law; a construction too absurd and mischievous, to be for a moment supported.

Now it will appear, from a reference to the record, that the disseisin or forcible entry com-

plained of, took place some time in the year 1814, and that the present action of injury, to recover compensation for the alledged wrong, was brought on the 18th day of March, in the year 1816, leaving an interval between the supposed injurious act, and the complaint, of at least fourteen months and seventeen days.—And thus, by the plea of prescription, this action is overthrown.

Brent for the plaintiffs. I will first reply to the plea of prescription set up by the defendant, and then shew, that the merits of the case are with us.

This plea of prescription, was not made in the court below, and cannot be made now.

All pleas or, in the technical language of the civil law, exceptions must be set forth by the party, wishing to avail himself of them, and they cannot be supplied by the court. *ff.* 44, *tit.* 1. § 1, 2 and 3. 8 *Le Clerq, Droit Romain* 83. No new pleadings can be made, nor new evidence given in this court, which is to judge according to the record, and give that judgment which the court below should have given. But it is clear that the court below could not have supplied this exception; and, therefore, that it cannot be noticed here. *See act of* 1813.

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On the merits, the defendant must be equally unsuccessful. From the statement of facts, it appears the defendant requested the sheriff to put him in possession of the premises which he had previously purchased. Now the sheriff, agreeably to the duties of his office, as known at common law, is not bound to deliver to the vendee possession of real estate sold under a *fi' fa.* 1 *Haywood*, 495. This principle is uncontrovertible. We can go to no other system than the common law to learn the duties and powers of the sheriff; the civil law can give us no light on the subject; for such office was unknown to it. If then the sheriff was not bound to deliver possession of the real estate sold, and he undertook to do it at the request of the vendee, both were trespassers and jointly and severally responsible in damages to the plaintiffs. The common law doctrine is well stated in 6 *Wilson's Bac. Abridg.* 589. Every party to a trespass is liable to an action of trespass; for there can be no accessary in trespass." So "if A command or request B to take the goods of C, and B does it, this action lies as well against A as against B. And, "if J. S. agree to a trespass which has been committed by J. N. for his benefit, this action lies against J. S. although it was not done in obedience to his command, or at his request."

"If divers persons have been guilty of a trespass, the party injured may bring an action of trespass against them all, or against any one or more of them." These principles might be proved by reference to every elementary book as well as to innumerable adjudged cases. Such also is the doctrine of the civil law. "*Je suis censè avoir fait moi-meme ce que quelqu'un a fait en mon nom, quoique sans aucun ordre, lorsque j'y ai donné depuis mon approbation.*" *Pothier, Traité de possession, no. 23, L. 152, § 2. ff. de reg. jur. l. 1, § 14, ff. de vi & vi arm.*

The evidence, exhibited in the statement of facts, shews that the defendant, not only consented to the trespass after it was done, by taking possession of the estate; but that he requested to be put in possession thereof.—It was committed not only at his request, but for his benefit; thus bringing the case directly within the authority cited.

The charge of the judge, to the jury, was in conformity with these principles; and the jury, the sole judge of the damages, have fixed the amount for which the plaintiffs should have the judgment of this court.

Derbigny, J. delivered the opinion of the court. The first question which presents itself

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here is, whether any trespass has been committed—if decided in the affirmative, the second will be, whether, from the conduct of the defendant, he ought to be considered as one of the trespassers, and, as such, liable to indemnify the plaintiffs.

To come to a clear understanding of the first question, the previous inquiry must be, who was in possession of the plantation, when the sheriff came there, with the *posse comitatus*? The plaintiff, to be sure, was in the actual occupation of the house; but we are not to conclude from that circumstance, that she was the possessor. The plantation had been previously seized. What is the effect of a legal seizure? Surely it is to place the property under the custody of the law, until it is disposed of according to law. Formerly, under the government of Spain, the property seized, whether real or personal, was deposited in the hands of some person of solvent fortune: "*Los bienes executados, ora sean muebles ò raices, se han de sequestrar, inventoriar y depositar en persona abonada, sin llevarlos nin tenerlos en su poder el alguacil.*" *Curia Philipica, tit. Execucion no.* 19. This has been altered into a deposit into the hands of the sheriff himself: "after such seizure, the sheriff shall keep the property

so seized at his risk &c. (see page 172 and 242, of the first volume of the acts of our legislature.) The moment then, that a seizure is regularly made, (and we are bound to presume that this is, nothing being shewn to the contrary) the thing ceases to be possessed, by the person in whose possession it was found, and is placed under the custody of the sheriff. A practice, introduced for the mutual convenience of the party and of the sheriff, is to leave the possessor on the property seized; but that does not change the situation of the thing; the occupier is there, by permission of the sheriff, and is supposed to keep the property for him.

In this case, however, it is said, that the property seized continued to be legally possessed by the plaintiff, because her husband, the debtor against whom the execution went, being not the owner of the premises, the seizure was illegal. We do not think that this circumstance made any difference, as to the actual possession of the thing by the sheriff. The plaintiff might indeed have caused that possession to cease, on making known that the property was hers; but, so long as she thought fit, to acquiesce by her silence in the possession of the sheriff, that possession continued. It had not yet ceased, when the sheriff transferred it to the appellant;

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that transfer therefore cannot be viewed as a trespass. If a trespass was committed, it took place when the sheriff seized the property, and the sheriff alone can be answerable for it.

Should we admit, that the possession of the plantation was retained by the plaintiff, notwithstanding the seizure, and that the forcible entry of the sheriff on it was a trespass, the claim of the plaintiff would still be unsupported by the evidence. The appellant did not aid the sheriff in taking possession by force; he simply received from him, the transfer of that possession, after it had been taken. He was a *bona fide* purchaser, and became a *bona fide* possessor. Far from being answerable in damages towards the plaintiff, he had a right to enjoy whatever the plantation produced, with or without culture, and was not even liable for the loss of the property. *Code Civ.* 480 *art.* 30.

From this view of the subject, it becomes unnecessary to examine the other questions, which were raised in this case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that judgment be entered for the defendant with costs.

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The supreme court will not issue a *mandamus* to restore the clerk of a district court, to his office.

STATE vs. *DUNLAP & AL.*

MARTIN, J. delivered the opinion of the court. On the affidavit of Samuel Thornberry, that he was duly appointed clerk of the parish of Concordia, and has ever fulfilled all the duties of the office with care and fidelity, and yet the judge of the seventh district has removed him therefrom, and appointed Edmund Randolph, the other defendant, in his stead, and compelled, by force, a surrender of the records and papers of the office from the deponent to said Randolph, a rule was granted to shew cause why a *mandamus* should not issue for the restoration of the defendant in his said office, and the return of the records and papers thereof to him.

After hearing an argument, this court is of opinion that the *mandamus* cannot issue.

The clerk cannot be considered as removed: for this court alone has the power of removing him. The facts sworn to present only the case of a disturbance. If it does really exist, the deponent has his remedy in the ordinary course of justice, by an action for damages, and the intruder may be ousted by a writ of *quo warranto*. It is true, in a case like the present, an

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officer is commonly reinstated by a writ of *mandamus*. But, it cannot be believed that, if the present incumbent be declared by a proper judgment to have been illegally placed in an office, which was not vacant, the court of the seventh district will prevent the defendant from acting.

Were we to proceed, in a summary mode, by the process of *mandamus*, we would take original cognizance in an extraordinary manner, of a right to an office, contested by two persons—a right which may effectually, though less speedily, be asserted in the ordinary course of justice.

The rule must be discharged.

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When the judgment contains not the reasons, on which it is grounded, it will be set aside but if the record contains the whole evidence, the supreme court, will give such a judgment as ought to have been given below.

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. In this case there was a judgment for the defendant and appellee.

The appellant shews that the judgment ought to be reversed, because it contains the citation of no law, nor any reasons, and therefore is void, under the law and the constitution.

This point has been frequently determined, and lately in the case of *Urquhart* vs. *Taylor*, in this court, during this term, *ante* 200.

The judgment is therefore annulled, avoided and reversed. *Laverty & al.* vs. *Gray & al.* 4 *Martin*, 463. *Sierra* vs. *Slort*, *id.* 316.

Although an answer to interrogatories be excepted to, and the exception sustained, the party has no right to take it away.

Proceeding to inquire what judgment the court below ought to have given, we are arrested by a bill of exceptions of the defendant.

The court below, having pronounced the answers of the plaintiff to the defendant's interrogatories not properly sworn to; and the plaintiff having filed a second answer, his attorney took out the first. At the trial, the defendant, stating that the first answer was necessary to him in lessening the credit which was to be given to the second, moved the court to order the attorney to replace it on the files; and the court refusing to do so, on the ground that the defendant, having once objected to the reading of the paper, was not entitled to demand it, the defendant excepted to the opinion of the court.

We think that the court ought to have ordered the attorney to replace the answer on the files. A paper once put on record, or on the files of the court, ought not to be withdrawn without leave. Each party has a right to the proper use of it. Although the defendant had

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refused to allow the reading of the paper by the plaintiff, yet he had the right of using it *against* him. If the answer had not been sworn at all, surely the defendant might have opposed the reading of it till it was sworn to—yet this would not deprive him from the benefit of any admission therein made by the plaintiff, which, though not evidence for the plaintiff, without being sworn to, was evidence against him without. It cannot be denied, that the defendant might oppose to the answer, in order to diminish the force of it, any contrary declaration orally made by the plaintiff—the same declarations could not be refused to be given in evidence, because they were *written*—nor because they were contained in a paper which had once been tendered by the plaintiff, and the illegal introduction of which by the plaintiff the defendant had resisted. A party may offer his antagonist's declaration to derogate from the credit of his answer on oath, without being compelled to present that declaration as absolute evidence.

The whole evidence to which the parties are entitled, not being before us, we are unable to pronounce a final judgment—the cause is therefore remanded for trial, with directions to the district court to order the attorney of the plain-

tiff to return the fact answer to the files of the court.

But the appeal being taken from an erroneous judgment, the costs of the appeal must be borne by the appellee.

Baldwin for the plaintiff, *Porter* for the defendant.

SEVILLE vs. *CHRETIEN*.

Under the territorial government, the nonsuit of an appellee, who was plaintiff below, did not revive his judgment.

Under the French government in Louisiana, some Indians were held in slavery, and the freedom of such was not acquired by the establishment of the Spanish government.

APPEAL from the court of the fifth district.

MATHEWS, J. delivered the opinion of the court.* The plaintiff and appellants sues, *in forma pauperis*, to recover his liberty, and judgment having been given against him, he appealed.

The evidence, which is all written in the form of depositions, and other documents, comes up with the record, and a statement of the case is made by the counsel.

Several exceptions, to the admission of testimony, appear to have been taken, during the course of the trial, in the district court, by each of the parties, and although not regularly re-

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

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duced to writing, and signed by the judge, might be noticed, under the circumstances of the case and the agreement of the counsel, were it necessary for the purpose of obtaining a knowledge of any fact, important to a correct decision of the suit. The district judge having admitted all the testimony offered, we deem it useless to enter into a formal investigation and decision of each exception: but will proceed to state the facts as drawn from the evidence, which was properly received. A summary of such of them as are necessary, to arrive at proper legal conclusions, may be laid down as follows:

In the year 1765 or 1766, Duchene, an Indian trader, brought an Indian woman to Opelousas, whom he sold to Chretien, the father of the defendant and appellee: she died not long after, leaving a female child, who remained peaceably with Chretien, as his slave, until some time during the period in which the Baron de Carondelet was governor of the province of Louisiana: when she went to New-Orleans, with her master, for the purpose of claiming her freedom before the proper tribunal. It appears from a certificate of Peter Pedesclaux, a notary, that a suit was commenced, but no record remains, or can be found, of the manner

in which it terminated. She returned with Chretien, and remained with him as his slave, until his death, which happened after the United States took possession of the country, under the treaty, made with the French government, in the year 1803; she was called Agnes, and brought several children, while held in a state of slavery, by Chretien, of whom the plaintiff and appellant is heir. After the death of the ancestor of the defendant, and the distribution of his estate, Agnes and some of her children, all descended from the Indian woman sold by Duchene, as above stated, brought suit in the parish court of St. Landry against their owners, among whom, was the present defendant, to recover their freedom. From a judgment by default, which afterwards became final, an appeal was taken to the superior court, of the late territory of Orleans, where the cause was tried by a jury, and a verdict rendered in favour of the then plaintiffs and appellees, which was set aside, by the court, on account of some misconduct in the jury, and a new trial ordered. The case remained in this situation, until the change in the country, from a territorial to a state government, and was then transferred with others to the fifth district, under the new system. As the person, who became judge of that

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district, had been engaged as counsel in the cause, it was transferred for trial to the second district; and the then appellee, who was the original plaintiff, not appearing to prosecute his suit, was declared by the court to be nonsuited, and judgment was accordingly entered.

It appears from the depositions of a number of witnesses, (admitted by the parties to have been correctly taken, and to be proper evidence in the cause,) that at the time the Spanish government took possession of the country, viz. in 1769. under the secret treaty of cession, made between France and Spain in 1763, many of the inhabitants of the colony, which had been established and settled under the authority of the French government, held and possessed Indians as slaves, and it seems to have been a belief pretty general among them, that the practice of holding Indians in slavery was tolerated and authorized by that government. The fact that a considerable number of Indians and their descendants were held in slavery, at the period alluded to, is clearly proven.

These being all the important facts in the case, we will proceed to examine the plaintiff and appellant's claim to freedom, on the ground taken by his counsel.

It is grounded on a judgment of the parish court of St Landry, as being *res judicata*, by a competent tribunal. But, if it be determined that it be not conclusively supported and established by the judgment, it is contended that the plaintiff and appellant is free by birth, being the lineal descendant of an Indian woman.

I. Having already given a concise history of the suit, (to its final decision) in virtue of which the plaintiff and appellant claims his freedom as a *res judicata*, it remains only for us to ascertain the just and legal effects of the judgment of nonsuit obtained against him, in the court of the second district.

It is contended, that this judgment, given at the instance of the then appellant, amounts, on his part, to a desertion of the appeal; because, although defendant, in the inferior tribunal, in appeals according to the judicial system of the late territory of Orleans, the appellant assumed the place of plaintiff.

It is true, the appellant, even when he had been the original defendant, became actor, after having obtained the appeal. It became his duty to bring up the record, to cite his adversary, who was bound to answer on the appeal. But, after the appellee had appeared, and filed

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the answer required of him by law, viz. that there was no error in the proceedings, it became the duty of the superior court not to proceed to hear the appeal, on the issue there joined, *error vel non*, but to hear and determine the cause on the pleadings transmitted. For this purpose, a trial *de novo* took place, uninfluenced by any thing that had been done below. The evidence was not confined to what had been there offered; and, to bring the merits completely before the court, the very pleadings were allowed to be amended. 1807, 1. If a jury had been prayed for below, it was above a matter of course, without being demanded anew. *Bayon* vs. *Rivet*, 2 *Martin*, 148. Whether the trial was before a jury or the court, no judgment of affirmance or reversal was pronounced, but the verdict or judgment was always as on an original suit.

Being acted *de novo*, after the answer of the appellee, the cause was before the supreme court in nearly the same state as it would have been in the court below, after a new trial had been granted. The plaintiff was required by law to make out his case, unaided by the previous judgment, if it was in his favor, disembarrassed from it, if it was adverse, and the consequences of his failure to produce proof in support of his action, were necessarily the same in both courts.

The answer, that there was no error, amounted to nothing more than an admission that the appeal was properly before the court. It was a plea to the merits, which precluded, after it, any allegation against the propriety of sustaining the appeal. This clearly results from the absence of any provision in the act, by which the whole evidence given below might have been transmitted to the court above, without which the judgment of the inferior court cannot be examined: and when we consider that other proof than that which was given below, was received at the trial above, and that the superior court was directed to hear and determine on the pleadings transmitted, not on the issue joined above, *error vel non*, that no direction was given to affirm or reverse, but to hear the cause *ex parte*, in the absence of the appellee, and to give such a judgment as the nature of the case might require, and issue execution thereon, the conclusion is irresistible, that there was to be a trial and judgment *de novo*. Indeed, any person the least conversant with the practice of the superior court, under the late territorial government, knows that appeal cases were tried as original ones. If, as already stated, a jury had already been prayed for below, it was had as a matter of right above. If the cause had been

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tried, in the first instance, by the judge, on the appeal, the superior court heard the evidence; and the original defendant, even when he was the appellant, always had the benefit of the rule *actore non probante absolvitur reus.* When the trial was by jury, the cause was submitted to them on the original issue, unless, on an amendment of the pleadings, a new one was joined. Being charged to try the same issue, it follows, as a consequence, that the pleadings, not being directed by law to be different, were necessarily to be the same, on both trials. If the law required the plaintiff below to be present, at the delivery of the verdict; if it would not allow his final condemnation when he did not appear and offer evidence, in the inferior court, nothing could authorize the superior to deviate from the usual mode of proceeding—any other would be arbitrary.

We have already traced the progress of the first suit instituted by the appellee, for the recovery of his freedom, down to the judgment of non-suit rendered in the district court, which, in the present action, he insists, is a dereliction of the appeal from the judgment originally given in his favor, in the parish court; this court is of a different opinion.

It is believed that, according to the practice

of tribunals governed by the general principles of the civil law, in cases of appeal, it is necessary, before a judgment can have the force and effect of the thing judged, that certain measures should be pursued by the party claiming the benefit of it, to have the appeal declared to be abandoned by the appellant. Far from any step of this nature having been taken in this case, it is seen that the appellant was present, urging the trial of his cause, and that the judgment of the district court was the consequence of the latches of the appellee, who, as has been already shewn, was bound to prosecute and make out his case, as upon a new trial. The judgment of non-suit was given in favor of the appellant, the original defendant, and now so to construe it, as to make it destructive of his right, would certainly be absurd and unjust.

Being of opinion that the claim of the present plaintiff and appellant to freedom is not supported by the judgment of the parish court as *res judicata*, it remains for us to examine his pretentions to it by birth.

II. His counsel contends that the decision of the cause must be according to the rules of the Spanish system of laws. According to these laws, it is clear that since the famous regulations

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of Charles V. made about the middle of the fifteenth century, Indians could not be reduced to slavery, and if the case was to be decided by them, he would certainly be entitled to his freedom. But on the other side, it is contended that this court ought to be governed in the determination of this suit, by the municipal laws and usages of France, by which her American colonies were ruled. On this previous question, our opinion is in favor of the defendant and appellee. It is true that the province of Louisiana was ceded by France, to Spain in 1763, by a secret treaty, but no effectual possession of the country was taken, until the arrival of governor O'Reilly in 1769. Now, it is an incontrovertible principle of the laws of nations, that in cases of the cession of any part of the dominions of one sovereign power to another, the inhabitants of the part ceded, retain their ancient municipal regulations, until they are abrogated by some act of their new sovereign. In relation to the colony of Louisiana, nothing tending to repeal its former laws, such as they were under the French government, took place till the year 1769, and we have already seen, that the Indian woman, the ancestor of the plaintiff, was brought into the country, and sold as a slave in the year 1765 or 1766.

Slavery, notwithstanding all that may have been said and written against it, as being unjust, arbitrary and contrary to the laws of human nature, we find in history, to have existed from the earliest ages of the world, down to the present day.

In investigating the rights of the parties, now before the court, it is deemed unnecessary to inquire into the different means, by which one part of the human race have, in all ages, become the bondsmen of the other, such as captivity, being the offspring of those already enslaved, &c. However, we are of opinion, that it may be laid down as a legal axiom, that in all governments, in which the municipal regulations are not absolutely opposed to slavery, persons, already reduced to that state, may be held in it, and we also assume it, as a first principle, that slavery has been permitted and tolerated, in all the colonies established in America, by European powers—most clearly as relates to the blacks or Africans, and also in relation to Indians, in the first periods of conquest and colonization. Taking this principle for granted, it accounts in some measure, for the absence of any legislative act of the European powers, for the introduction of slavery into their American dominions. If the record of any such act ex-

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ist, we have not been able to find any trace of it. It is true that Charles the fifth, in the first part of the sixteenth century, granted a patent, to one of his Flemish favourites, for the exclusive right of importing four thousand negroes into America, which was purchased by some Genoese merchants, who were the first, who brought into a regular form, the commerce for slaves between Africa and America. A few years before, a small number of negroes had been introduced by the permission of Ferdinand. But the priviledge, granted by the Emperor, so far from being the first introduction of slavery into the new world, was intended as a means of enabling the planters to dispense with the slavery of the Indians, who had been reduced to a state of bondage, by their European conquerors. A full account of these transactions may be seen in Robertson's history of America.

On turning our attention to the first settlement of the British colonies in America, we find that the introduction of negro slaves, into one of the most important, was accidental. In the year 1616, as stated by Robertson, and 1620, by Judge Marshal, in his life of Washington, a Dutch ship from the coast of Guinea, sold a part of her cargo of negroes to the planters on James river. This is the first origin of

the slavery of the blacks, in the British American provinces. About twenty years after, slaves were introduced into New England. All this took place, without any previous legislative act on the subject: and it is believed that Indians were at the same time, and before, held in bondage. The absence of any act, or instrument of government, under which their slavery originated, is not a matter of greater surprise, than that there should be none found, authorizing the slavery of the blacks.

The first act of the legislature of the province of Virginia, on the subject of the slavery of the Indians, was passed in 1670, and one of its provisions, as we are informed by Judge Tucker, prohibits free or manumitted Indians from purchasing christian servants.—The words, *free or manumitted*, are useless and absurd, if there did not exist Indians in slavery, and Indians who had been slaves, and had been manumitted, before and at the time this act was passed. Indeed from the history, and legislative proceedings of the British colonies, both in the West India islands and in North America, it clearly appears, that in most, if not in all of them, the slavery of the Indians was tolerated by government, in the early peri-

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ods of their settlement, without any specific legislation on that subject.

The French government was later, in establishing colonies in America, than the British and Spanish. In our researches, on the subject under consideration, we have not been able to discover any legislative act of it, by which the colonies were authorized to hold Indians in bondage, but that it was customary to purchase and hold some classes of them in slavery cannot be doubted. This cannot have been without the permission, or at least the toleration of government. Moreau de St. Mery, speaking of the black population of St. Domingo, observes, that among it are the descendants of some Indians from Guiana, Louisiana, &c. whom government and individuals, in violation of the law of nature, deemed it profitable to reduce to slavery. 1 *Hist. St. Dom.* 67. In the beginning of the eighteenth century, he adds, there were upwards of three hundred Indian slaves, in the French part of St. Domingo. In 1730, the governor of Louisiana, sent three hundred of the Natchez tribe to be sold. Several arrived after that period from Canada and Louisiana.

Here, we have historical facts, establishing beyond contradiction, the holding of Indians

as slaves in one of the French colonies, many of whom were transported from the very colony, in which the ancestor of the plaintiff and appellant were held in bondage. Were it necessary to prove that they were legally held so, the evidence of it would be found, in their being taxed as slaves, 2 *St. Domingo laws*, 541; a circumstance, which creates at least a very violent presumption, that the municipal regulations of the French colonies, did not prohibit the slavery of the Indians. This appears to have been the opinion of the Spanish government, which we have seen succeeded to the French in Louisiana. Governor O'Reilly, in 1769, on taking possession of the colony, discovered that a considerable number of Indians, were held in slavery, by the French colonists. This he declared, by a proclamation, to be contrary to the wise and pious laws of Spain: but by the same instrument, he confirmed the inhabitants in their possession of such Indian slaves, until the pleasure of the king, in this respect, could be known. Here is then a recognition of the right of the possessors, to hold their Indian slaves, until the legislative will of the monarch should deprive them of it. This never did happen. In conformity with this opinion, is a decree of the Baron de Carondelet, twenty five

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years after, in 1794, by which he orders two Indians, Alexis and David, to return to, and abide with their owners, until the royal will was expressed to the contrary.

The inhabitants of the colony of Louisiana, while under the government and dominion of France, held Indians in slavery. The Spanish government, under which they passed, recognized their right to hold them, until it should be altered by a declaration of the king's will. It never was declared. The colony, without any change in the condition of the original population, is receded to the French nation, and by it transferred to the United States, under a treaty securing to its inhabitants, their rights to property, as they stood under the former government. Throughout these political changes, the ancestor of the defendant and appellee, remained undisturbed in his possession, of the plaintiff and appellant's mother, as his slave, and of him since his birth. It is true that, during the government of the Baron de Carondelet, the plaintiff's mother, as has been stated, made an attempt to obtain her freedom: what proceedings took place before that governor, whether any, or what judgment was rendered, cannot now be ascertained. The only thing clear is, that she returned with the defen-

dant's father from New-Orleans, and remained with him as his slave, until his death. This certainly raises a presumption, that the suit terminated in a manner unfavourable to her claim. If this is to have any weight on the determination of the present case, it must certainly be placed against the plaintiff.

Upon the whole, we are of opinion, that neither from a view of the political changes in the country, nor a fair examination of the subject, is the plaintiff and appellant entitled to his freedom.

It, is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed.

Baldwin for the plaintiff, *Brent* for the defendant.

*** There was no case determined during the months of October and November.